# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1912.

No. [redacted] 25.

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THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE HARDWICK FARMERS ELEVATOR COMPANY.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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FILED MARCH 31, 1910.

(22,084)

(22,084)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1911.**

## No. 242.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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*a* State of Minnesota, Supreme Court.

STATE OF MINNESOTA,
*Office of Clerk of Supreme Court, ss:*

I, I. A. Caswell, Clerk of the Supreme Court of the State of Minnesota, do hereby, in obedience to the Writ of Error herein issued, certify and return to the Supreme Court of the United States of America, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment roll and all of the proceedings had in the said Supreme Court of the State of Minnesota in the case between The Hardwick Farmers Elevator Company, Respondent, and The Chicago, Rock Island and Pacific Railway Company, Appellant, including the opinion of the said Supreme Court therein, as appears from the original files and records.

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing are true and correct copies of the Petition for Writ of Error, with allowance of the same, and order fixing bond; of the Assignment of Error filed in the Supreme Court of the State of Minnesota; of the Assignment of Error and Petition for Reversal; of the Supersedeas Bond, as the same remain on file and of record in said Supreme Court of the State of Minnesota; and also the original Writ of Error from the Supreme Court of the United States, and the Citation issued thereon, with proof of service thereon and on each of the same endorsed, and that the foregoing constitutes a true, full and complete return to said Writ of Error.

In witness whereof, I have hereunto set my hand and the seal of said Supreme Court, at the Capitol at St. Paul, Minnesota, this 23d day of February, A. D. 1910.

[Seal of the Supreme Court, State of Minnesota.]

**I. A. CASWELL,**
*Clerk of the Supreme Court of Minnesota.*

*b* No. 16362. State of Minnesota, Supreme Court. Hardwick Farmers Elevator Co., Respondent, against C. R. I., & Pac. Ry. Co., Appellant. Judgment Roll. Filed Feb. 8, A. D. 1910. I. A. Caswell, Clerk.

*c* 16362. State of Minnesota, Supreme Court. Copy of Minutes of Argument. Filed Feb. 8, A. D. 1910. I. A. Caswell, Clerk.

*d* State of Minnesota, Supreme Court, General October Term, A. D. 1909.

Friday morning, 9:30 o'clock, Nov. 19, A. D. 1909, Court convened pursuant to adjournment. All the Justices being present.

Reg. No. 16362. Cal. No. 152.

HARDWICK FARMERS ELEVATOR COMPANY, Respondent,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk,*
By —— ——, *Deputy.*

*e* No. 152. State of Minnesota, Supreme Court. Copy of Order for Judgment. Filed Feb. 8, A. D. 1910. I. A. Caswell, Clerk.

*f* State of Minnesota, Supreme Court, October Term, A. D. 1909.

No. 152.

THE HARDWICK FARMERS ELEVATOR COMPANY, Respondent,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Appeal from District Court, Thirteenth Judicial District, County of Rock.

This cause having been duly argued and submitted at the General October Term of this Court A. D. 1909, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein

appealed from, be and the same hereby is, in all things affirmed and that the Respondent above named have judgment accordingly.

Entered Feb. 8, A. D. 1910.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

*g* 16362. State of Minnesota, Supreme Court. Transcript of Judgment. Filed Feb. 8, A. D. 1910. I. A. Caswell, Clerk.

STATE OF MINNESOTA,
*Supreme Court, ss:*

I, I. A. Caswell, Clerk of said Supreme Court do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol in the City of St. Paul, this 8th day of February, A. D. 1910.

[Seal Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

*h* State of Minnesota Supreme Court, October Term, A. D. 1909.

No. 152.

HARDWICK FARMERS ELEVATOR COMPANY, Respondent,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause, on the 8th day of February, A. D. 1910.

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Thirteenth Judicial District, sitting within and for the County of Rock, be and the same hereby is in all things affirmed. And it is further determined and adjudged that the Respondent

above named, do have and recover of said Chicago, Rock Island and Pacific Railway Company, Appellant herein, the sum and amount of Forty-seven and 95/100 Dollars ($47.95) costs and disbursements in this cause in this Court, and that said Respondent have execution for the enforcement thereof.

Dated and signed this 8th day of February, A. D. 1910.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

*Statement for Judgment.*

| | |
|---|---|
| Costs allowed by statute | $25.00 |
| Return | |
| Printer's Fees | 11.70 |
| Clerk's Fees, Supreme Court | 11.00 |
| Filing Mandate | |
| Affidavits and Acknowledgments | .25 |
| Postage | |
| | $47.95 |

*i* 16362. State of Minnesota, Supreme Court, October Term, 1909. The Hardwick Farmers Elevator Company, Respondent, vs. Chicago, Rock Island and Pacific Railway Company, Appellant. Return on Appeal. C. H. Christopherson, Attorney for Respondent, Luverne, Minnesota. A. J. Daley and Stringer & Seymour, Attorneys for Appellant, St. Paul, Minnesota. Filed September 15, 1909. C. A. Pidgeon, Clerk.

1 STATE OF MINNESOTA,
*County of Rock, ss:*

State of Minnesota Supreme Court, October Term, 1909.

District Court, 13th Judicial District.

THE HARDWICK FARMERS' ELEVATOR COMPANY, Plaintiff,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Defendant.

*Amended Complaint.*

The plaintiff for its cause of action complains of defendant and alleges:

I. That plaintiff is a corporation duly organized and created under the laws of the State of Minnesota, and engaged in the buying and selling of grain, coal and feed in the village of Hardwick, in said county and state.

2 II. That defendant at all the times herein mentioned has been and still is a railroad company operating a railroad run-

ning between the station of Hardwick in said county and all other stations herein mentioned.

III. That said station of Hardwick is an intermediate point on the line of defendant's road as the term is used in chapter 23 of General Laws of 1907.

IV. That at various times in the year 1907, plaintiff made application in writing to defendant's agent at said station of Hardwick for cars in which to ship freight; that said applications stated the number of cars wanted, the time and place desired, the character of the freight and its final destination; that said applications were made upon suitable blanks for that purpose; that said blanks were provided by defendant; that a detailed and itemized statement of the times said applications were made, and received by defendant, the number of cars wanted, the time and place desired, the character of the freight and its final destination is shown by Exhibit A which is hereto annexed and hereby expressly made a part of this complaint; that all of said applications were made in good faith and that at the respective times of the making of the said several applications the plaintiff actually had for transportation and shipment the freight described in said applications respectively and as shown in Exhibit A.

3 V. That defendant failed to supply and furnish cars to plaintiff within 72 hours after the receipt by defendant of said respective applications, Sundays and legal holidays excepted, as prescribed by said chapter 23 of General Laws of 1907; but that defendant supplied and furnished said respective cars as shown in said Exhibit A and the number of days late, exclusive of said 72 hours, Sundays and legal holidays as shown in said Exhibit A.

VI. That by reason of the foregoing, under the terms of said chapter 23 of General Laws of 1907, defendant became on November 11th, 1907, indebted to plaintiff in the sum of two hundred eighteen dollars, the payment whereof has been duly demanded by plaintiff from defendant, but that no part thereof has been paid.

VII. That a reasonable attorney's fee for bringing this suit is the sum of fifty dollars.

Wherefore plaintiff demands judgment:

*a*. For the sum of two hundred eighteen dollars with interest thereon from the 11th day of November, 1907, at the rate of six per centum per annum.

*b*. For the costs and disbursements of this action, including fifty dollars attorney's fees as provided by chapter 23 of General Laws of 1907.

C. H. CHRISTOPHERSON,
*Attorney for Plaintiff, First National Bank Bldg., Luverne, Minnesota.*

| Date on which application was made and received by defendant. | Number of cars wanted. | Time cars desired. | Place cars desired. | Character of freight. | Final destination. | Date on which cars were furnished. | Number of days late. |
|---|---|---|---|---|---|---|---|
| Sept. 19, 1907.. | 2 | Same date. | Hardwick, Minn. | Grain. | Chicago, Ill. | Oct. 1, 1907. | 9 |
| | | | | | | Oct. 5, 1907. | 13 |
| Sept. 21, 1907.. | 2 | Same date. | Hardwick, Minn. | Grain. | Minneapolis, Minn. | Sept. 24, 1907. | 1 |
| | | | | | | Sept. 25, 1907. | 2 |
| Sept. 26, 1907.. | 1 | Same date. | Hardwick, Minn. | Grain. | Chicago, Ill. | Oct. 10, 1907. | 12 |
| Sept. 28, 1907.. | 2 | Same date. | Hardwick, Minn. | Grain. | Chicago, Ill. | Oct. 17, 1907. | 17 |
| | | | | | | Oct. 28, 1907. | 28 |
| Sept. 30, 1907.. | 2 | Same date. | Hardwick, Minn. | Grain. | Minneapolis, Minn. | Oct. 11, 1907. | 9 |
| | | | | | | Nov. 9, 1907. | 38 |
| Oct. 7, 1907.. | 1 | Same date. | Hardwick, Minn. | Grain. | Minneapolis, Minn. | Oct. 29, 1907. | 20 |
| Oct. 17, 1907.. | 2 | Same date. | Hardwick, Minn. | Grain. | Chicago, Ill. or Davenport, Iowa. | Nov. 4, 1907. | 16 |
| | | | | | | Nov. 7, 1907. | 19 |
| Oct. 22, 1907.. | 2 | Same date. | Hardwick, Minn. | Grain. | Minneapolis, Minn. | Nov. 9, 1907. | 16 |
| | | | | | | Nov. 11, 1907. | 18 |
| | | | | | | | 218 |

5 (Title of Cause.)

*Answer to Amended Complaint.*

The defendant, the Chicago, Rock Island and Pacific Railway Company, for its answer to plaintiff's amended complaint, admits that the plaintiff is a corporation, created, organized and existing under and by virtue of the laws of the state of Minnesota, and it admits that it, at all times stated in the complaint, was, and still is engaged in business as in the complaint averred; and that the defendant is now, and at all times stated in the complaint was, a common carrier of freight and passengers. And, in this behalf, the defendant avers that it is, and at all the times stated in said complaint was, a railway corporation, created, organized and existing under and by virtue of the laws of the states of Illinois and Iowa. At all said times it maintained and operated lines of railway in the states of Minnesota, Iowa, Illinois, and elsewhere, and it was at all said times, and still is, engaged as a carrier of state and interstate commerce and traffic. All of its railways constitute one entire system and they are operated as such.

Among its lines of railway, that extending from Watertown in the state of South Dakota, by way of Hardwick, Minnesota, through the states of South Dakota, Minnesota, Iowa and Illinois by way of Davenport in the state of Iowa, to Chicago is one. Another of its lines of railway extends from said Watertown, in the state of South Dakota, by way of Hardwick, Minnesota, through the states of South Dakota, Minnesota and Iowa, by way of Germania, in said
6 state of Iowa, and thence through Minnesota by way of Albert Lea, Owatonna and Faribault, to Minneapolis, in said state of Minnesota.

At all times the traffic moved by defendant for the plaintiff herein, and any other person or corporation between said village of Hardwick, in said state of Minnesota, and the city of Chicago, in the state of Illinois, must be and was, carried upon defendant's line of railway through the states of Minnesota, Iowa and Illinois. Likewise, all traffic moved by defendant between the village of Hardwick and said city of Davenport, in the state of Iowa, must be and was carried through the states of Minnesota and Iowa; and all traffic moved by defendant between said village of Hardwick, Minnesota, and the city of Minneapolis, in the state of Minnesota, must be and was carried over defendant's line of railway through the state of Minnesota and Iowa. It was not possible for this defendant to move any traffic between said village of Hardwick and said cities of Chicago, Davenport, or Minneapolis, respectively, except through said states as herein set forth, as this the plaintiff well knew when it offered or delivered to the defendant any grain or other articles of commerce for transportation between said stations.

A true and correct map of the lines of railway of this defendant now or at any time operated by it, showing the states traversed by said railway and the location of the various towns, cities and vil-

lages along its railway, is hereto attached and made a part
7 of this answer, and marked Exhibit "A."

The defendant further avers that, at the time when plaintiff alleges that it demanded the cars to be furnished in order to move said grain to destination, it was at a season when, because of the volume of grain and merchandise which this defendant was required to transport, movement of freight was difficult, congested and embarrassed. At said times mentioned in the complaint, there was upon the lines of defendant's railway and elsewhere, an unusual and unprecedented congestion of traffic, which this defendant could not have foreseen, and which it was beyond the power of the defendant to relieve. This defendant was, at said times mentioned in the complaint and hereinbefore referred to, unable to furnish at once all of the cars desired by plaintiff herein, by reason of their temporary and unavoidable detention and use in other states while engaged in moving interstate traffic and commerce. This defendant had, theretofore, at great cost and expense purchased a large supply of cars—much more than sufficient to move normal traffic upon its lines of railway—with the expectation of furnishing its patrons including this plaintiff, with such a number of cars as would adequately and promptly transport all traffic offered to it. But, at said times, the volume of traffic offered this defendant and other railway companies in the socalled Northwestern States, of which the state of Minnesota is one, was greater than ever before or since in the history of Minnesota railroads, and, notwithstanding the most
8 diligent efforts so to do, it was beyond the power of this defendant to provide for immediate movement of such traffic, by reason of the foregoing premises, but said railway company did at all times provide said plaintiff with its due and proper proportion of cars, and in a short time and as soon as relieved from said car shortage, and at the earliest time practicable and within the power of the defendant, did furnish all the cars required by plaintiff. To have sooner supplied said cars would have compelled this defendant as a common carrier to have discriminated against other interstate traffic and interstate commerce (which this defendant was required to transport) and such discrimination would have been contrary to the instructions, rules and order of the Interstate Commerce Commission of the United States in that behalf duly promulgated.

Solely by reason of said freight congestion and the consequent scarcity of cars and their use in moving traffic and commerce between the states, and from causes not within the power and control of this defendant to in any manner prevent, a delay in furnishing certain cars desired by plaintiff occurred. And, in this behalf, this defendant respectfully avers that said chapter 23 of said Laws of Minnesota for the year 1907, does not apply and cannot relate to the defendant's failure to move said grain as in the complaint and in this answer set forth—said consignments being commerce between the states—nor can said statute regulate or control the aforesaid interstate commerce and traffic offered to the defendant
9 as in said complaint and in this answer stated, because such control and regulation would be violation of the exclusive

powers granted to the Congress by the Constitution of the United States, being control and regulation of interstate commerce. And this defendant also respectfully avers that said statute, if enforced and applied to the consignments referred to in the complaint and in this answer, would deprive the defendant of its property without due process of law, and would deny this defendant the equal protection of the law, in violation of the Constitution of the United States.

This defendant makes the foregoing averments as a defense full and complete in itself, to the plaintiff's alleged cause of action.

## II.

As a second and further defense and in addition to that set forth in the first subdivision hereof, the defendant avers that the cars referred to in the plaintiff's complaint were furnished much sooner than in the complaint alleged. The defendant denies that written demand was made for said cars, as in said statute provided, although in this behalf defendant admits that if such demand had been made, defendant could not have complied therewith, for the reasons stated in the foregoing sub-division of this answer.

All allegations in said complaint contained not herein admitted, qualified or specifically denied, this defendant denies in whole and in part.

Wherefore, the defendant asks judgment that plaintiff
10 take nothing by this action, and that defendant have judgment for its costs and disbursements.

STRINGER & SEYMOUR,
*Attorneys for Defendant, 306 National German American Bank Bldg., Saint Paul, Minnesota.*

(Title of Cause.)

*Reply.*

The plaintiff for its reply to the answer to the amended complaint herein:

As to the first defense therein:

1. Admits all the allegations contained on the first page and all the allegations contained on the second page down to the paragraph beginning with the words "The defendant further avers that, at the time plaintiff," etc.

2. Denies each and every other allegation thereof which is not admitted in this reply.

As to the second defense therein:

Denies each and every allegation thereof.

C. H. CHRISTOPHERSON,
*First National Bank Building, Attorney for Plaintiff, Luverne, Minnesota.*

11 (Title of Cause.)

*Case and Bill of Exceptions.*

Be it remembered that this cause came on for trial March 18, 1909, before the Honorable P. E. Brown, Judge of said Court, and a jury. C. H. Christopherson appeared for the plaintiff. A. J. Daley and M. V. Seymour, of Stringer & Seymour, appeared for the defendant. The jury having been empanelled and sworn, the following proceedings were thereupon duly had and taken:

H. T. HALVERSON, testified in behalf of the plaintiff, as follows: I am now and for more than four years last past have been manager of the plaintiff and have had general charge of the buying and selling and shipping of the company's grain. Thereupon the witness testified that at various times between the 19th day of September, 1907, and the 22nd day of October, 1907, in the name and on behalf of the plaintiff company, he made applications in writing to the defendant and its agent at the station of Hardwick, that defendant furnish cars for the transportation of grain from said village of Hardwick in the county of Rock and state of Minnesota. Said applications stated the number of cars wanted, the time and place desired, the character of the freight and final destination thereof. Said applications were in the form prescribed by the third paragraph or subdivision of section 1, chapter 23, Laws of Minnesota for 1907, and were made upon suitable and proper
12 blanks for that purpose duly provided by the defendant. A detailed and itemized statement of the times said applications were made and received by the defendant, the number of cars wanted, the time and place desired and the character of freight and its final destination, and the dates upon which the aforesaid cars were furnished and the period or number of days default in furnishing the cars so demanded, exclusive of the period of seventy-two hours free time, Sundays and legal holidays, is attached to the amended complaint in this cause and is entitled Exhibit "A." The said statement is in all respects correct and truly sets forth the facts therein recited. Said applications and demands for cars were actually made in good faith and at the time when plaintiff made them it actually had on hand, ready for transportation, grain sufficient to fill the cars for which such applications were made, respectively, and that defendant utterly failed to comply with such demand for cars until the dates set forth in said exhibit.

JAY A. KENNICOTT, was thereupon duly sworn as a witness in behalf of plaintiff, and, being examined by Mr. Christopherson, stated that he was a duly licensed attorney at law in this state. The witness being further interrogated, the attorneys for the defendant inquired with respect to the nature of the testimony which the plaintiff proposed to prove by the witness. Upon being informed
13 that the testimony would relate to the value of the services of Mr. Christopherson as plaintiff's attorney in this case, the following admission was thereupon made:

Mr. SEYMOUR: The defendant will admit that if this is a proper case in which the plaintiff may recover attorney's fees under and by virtue of the prosecution of an action under Chapter 23 of the Laws of Minnesota for the year 1907, that the services of the attorney for the plaintiff are reasonably worth the amount set forth in the complaint, to-wit, $50. By this admission we do not, however, concede that plaintiff is entitled to recover attorney's fees, but the office of the suggestion is that there will be no controversy as to the value of those attorney's fees.

Mr. CHRISTOPHERSON: That admission is broad enough.

Plaintiff rests.

Mr. SEYMOUR: May the record show, if your Honor please, that the defendant, the Railway Company, asks the Court to dismiss the action for the reasons following:

1. The plaintiff has failed to show any liability to it on the part of the defendant.

2. That Chapter 23 of the Act of 1907, commonly known as the Reciprocal Demurrage Law of Minnesota, does not and cannot apply to the shipments or consignments alleged to have been offered by the plaintiff to the defendant herein, and that said statute so far as may concern such proffered shipments or consignments is
14 invalid and ineffectual, being an obstruction to and an attempted regulation of interstate commerce, in violation of Section 8, Article 1 of the United States Constitution and the laws of the Congress of the United States in that behalf duly enacted.

3. That the Act of 1907 by virtue of the provisions of which this suit is brought is invalid and ineffectual so far as may concern the interstate shipments and consignments offered the defendant in this case, and is in violation of the laws of the Congress and of the United States Constitution, and especially Section 1, Article 14, and because said Act if enforced would deprive this defendant of its property without due process of law, and would deny to the defendant the equal protection of the laws.

(Argument).

The COURT: The application of the defendant is denied, and exception allowed and taken.

J. R. PICKERING was sworn as a witness on behalf of the defendant, and testified:

I am, and for more than a year and a half last past have been, the Chief Freight Car Distributor of the defendant, the Chicago, Rock Island and Pacific Railway Company. Prior thereto, I was a traveling accountant. My duty as Chief Freight Car Distributor was and is to distribute the freight equipment among the various divisions equally and without discrimination, so far as I am able and to keep
in close touch with the car situation upon the lines of the
15 Company. Chief among the products or commodities moved by said railway company in the months of August, September, October and November of each year, are cotton, grain, stock, coal, broom corn, merchandise and hay. The states and territories which

in the fall of 1907 were, and still are, traversed by the lines of railway of the defendant company are Illinois, Iowa, Minnesota, Dakota, Nebraska, Kansas, Colorado, Missouri, Texas, Oklahoma, New Mexico, Tennessee, Arkansas and Louisiana. In normal years, harvest begins in Texas and Oklahoma about the middle of July; in Kansas about a week later. The grain crop in Minnesota, South Dakota and Iowa is the last to move—generally the last of August, or September in each year. From Oklahoma and Texas grain moves to the Gulf of Mexico, Galveston, Texas, being the principal seaport. From this port grain is shipped to Liverpool and foreign ports. Northern grain is shipped to Chicago, Minneapolis and Davenport. Most of the cotton crop moves to the Gulf, although much Asiatic cotton is transported to Japan by way of Minnesota Transfer in the state of Minnesota. In 1907, movement of grain in the northern territory was somewhat retarded by wet weather. The grain really began to move about September 20th or 21st. The volume of business, especially grain and cotton, moved by the company in the fall of 1907 was the largest in its history. This was induced in part by the unusually high prices. It became absolutely
16 impossible to furnish enough equipment to move the crops and commodities offered to us. There was an extraordinary congestion at Fort Worth, Texas, and at Galveston. In the movement of cotton during the fall of 1907, the Company was, in some cases, from thirty to sixty days behind. The Company had 45,000 cars. Before the fall of 1907, it purchased 5,000 freight cars which it added to its equipment of 45,000, making 50,000 in all. We tried unsuccessfully to borrow equipment from all the roads operating in the middle West. In September, October and November, 1907, our Interchange Car Account showed that we had upon our line 5,000 more cars than we had loaned to foreign lines. Of the entire business of the company upon the System, 85 to 90 per cent is interstate business. Upon the Dakota Division, in which Hardwick is situated, 95 per cent measures the proportion of interstate business, because this is an agricultural territory.

(The testimony of the witness was then addressed to matter relating to congestion of traffic and car scarcity during the fall of 1907. Because of the finding of the jury upon a question of fact, this testimony is not here given).

G. H. MORSE, sworn in behalf of the defendant testified that he was and had been for several years Chief Train Dispatcher of the Dakota Division, upon which Hardwick is situated.

The testimony of this witness related entirely to the distribution
17 of cars upon the Dakota Division during the periods complained of. Data were given showing the number of cars distributed upon the Division and the supply assigned to Hardwick. Because of the finding and verdict of the jury, this testimony is omitted.

M. L. HATCH, sworn in behalf of the defendant, testified that he was agent for the defendant, in the fall of 1907, at Hardwick. The testimony of this witness related entirely to the manner of distribution of cars among the elevators at Hardwick. Because of the finding and verdict of the jury, this testimony is not given.

Defendant rests.

E. A. BROWN, sworn on behalf of plaintiff in rebuttal testified that he was in the grain and coal business, and engaged in the operation of elevators in Northwestern territory. The witness testified with respect to the capacity of several elevators a Hardwick, also when the grain began to move in the fall of 1907. The witness further testified to the removal of certain empty cars from the Dakota Division in July, 1907, and later in the month of September. The testimony of this witness was addressed to the fact that these empty cars should have remained upon the so-called Dakota Division, upon which the village of Hardwick is situated. Because of the finding and verdict of the jury, the testimony of the witness with respect to said matter is not repeated here.

Mr. CHRISTOPHERSON: I would like to have it appear of
18 record that the allegation numbered 3 of the amended complaint, that the station of Hardwick is an intermediate point on defendant's line, as the term is used in Chapter 23 of the General Laws of 1907.

No objection.

Thereupon plaintiff rested.

The defendant also rested and the testimony was closed.

Thereupon the following proceedings were had:

Mr. SEYMOUR: The defendant requests the Court to charge the jury as follows:

1. The jury is instructed to return a verdict for the defendant.

2. The act of 1907, chapter 23, commonly known as the Reciprocal Demurrage Law of Minnesota does not apply to interstate shipments or consignments offered to or received by common carries and so far as may concern interstate commerce is invalid and ineffectual and in violation of the laws of Congress and of the Constitution of the United States, especially the so-called commerce clause, in section 8, article 1, of the United States Constitution.

3. Said Chapter 23 of the Act of 1907, commonly known as the Reciprocal Demurrage Law of Minnesota, does not apply to the shipments or consignments alleged to have been offered by the plaintiff to the defendant herein, and said statute so far as may
19 concern such proffered shipments or consignments, is invalid and ineffectual, being an obstruction and an attempted regulation of interstate commerce in violation of Section 8, Article 1, of the United States Constitution and the laws of Congress of the United States.

4. The Act of 1907 by virtue of the provisions of which this suit is brought is invalid and ineffectual so far as may concern the inter-

state shipments and consignments offered the defendant in this case, and is in violation of the laws of the Congress and of the United State Constitution, and especially section 1, article 14, and because said Act if enforced would deprive this defendant of its property without due process of law, and would deny the defendant the equal protection of the laws.

The COURT: Each request of the defendant is denied.

Mr. SEYMOUR: We except to the refusal of the Court to give the first instruction. We also except to the refusal of the Court to give the second instruction. We also except to the refusal of the Court to give the third instruction; and we also except to the refusal of the Court to give the fourth instruction.

The COURT: In this case it is conceded by counsel that if the plaintiff is entitled to recover anything it is entitled to recover $218, together with $50 attorney's fees—if any attorney fee can be legally taxed. By consent the Court is to permit the jury in the case to take the pleadings in the action to their room for convenience, and that all matter of dates in the schedule attached to the complaint is correct.

20 Mr. SEYMOUR: That is, we make no dispute as to it; there is no point made of that, at all.

Court here adjourned to 1:30 p. m.

*Charge.*

GENTLEMEN OF THE JURY: The plaintiff in this case, the Hardwick Farmers' Elevator Company claims and alleges that it is a corporation organized and created under the laws of this State and engaged in buying and selling of grain, coal and feed in the village of Hardwick. 2. That the defendant at all times herein mentioned has been and still is a railroad company operating a railroad running between the station of Hardwick and all other stations herein mentioned. That said station of Hardwick is an intermediate point on the line of defendant's road as the term is used in Chapter 23 of the Laws of 1907. 4. That at various times in the year 1907 the plaintiff made application in writing to defendant's agent at Hardwick for cars in which to ship freight; that said applications stated the number of cars wanted, the time and place desired, the character of the freight, and its final destination. That said applications were made upon suitable blanks for that purpose; that said blanks were provided by defendant; that a detailed and itemized statement of the times said applications were made and received by defendant; the number of cars wanted, the time and place desired, the character of the freight, and its final destination, is shown by

21 Exhibit "A" which is hereto annexed and hereby expressly made a part of this complaint. That all said applications were made in good faith, and that at the respective times of the making of the said several applications the plaintiff actually had for transportation and shipment the freight described in said application respectively, and as shown in Exhibit "A." 5. That the defendant failed to supply cars to the plaintiff within 72 hours after

the receipt by defendant of said applications, Sundays and legal holidays excepted; but that the defendant supplied and furnished said respective cars as shown in said Exhibit "A," and the number of days late exclusive of said 72 hours Sundays and legal holidays as shown in said Exhibit "A."

Up to this point, gentlemen, as I understand this evidence all the allegations of the complaint that I have read you are conceded to be true.

6. That by reason of the foregoing under the terms of said Chapter 23 of the General Laws of 1907, defendant became on November 11th, 1907, indebted to the plaintiff in the sum of $218, the payment whereof has been duly demanded by plaintiff from defendant but that no part thereof has been paid.

7. That a reasonable attorney's fees for bringing this suit is the sum of $50. Then follows a demand for the judgment that the plaintiff claims it is entitled to.

To this complaint the defendant, the Chicago, Rock Island and Pacific Railway Company has interposed the following answer: The defendant for its answer admits that the plaintiff is a corpora-
22 tion organized under the laws of this state. It admits that at all times stated in the complaint it was and still is engaged in business as in the complaint averred; and that the defendant is now and at all times stated in the complaint was a common carrier of freight and passengers; and in this behalf the defendant avers that it is and at all times stated in said complaint was a railway corporation created, organized and existing under and by virtue of the laws of the States of Illinois and Iowa. At all said times it maintained and operated lines of railway in the States of Minnesota, Iowa, Illinois, and elsewhere and it was at all said times and still is engaged as a carrier of state and interstate commerce and traffic. All of its railways constitute one entire system and they are operated as such. Among its lines of railway that extending from Watertown in the State of South Dakota by way of Hardwick, Minnesota, through the States of South Dakota, Minnesota, Iowa and Illinois, by way of Davenport in the State of Iowa to Chicago, is one. Another of its lines extends from said Watertown by way of Hardwick through the States of South Dakota, Minnesota and Iowa, by way of Germania in Iowa, and thence through Minnesota by way of Albert Lea, Owatonna and Faribault to Minneapolis in said state. At all times the traffic moved by defendant for the plaintiff herein, and any other person or corporation, between said village of Hardwick in said State of Minnesota and the City of Chi-
23 cago, must be and was carried upon defendant's line of railway through the States of Minnesota, Iowa and Illinois. Like wise all traffic moved by defendant between the Village of Hardwick and said city of Davenport must be and was carried through the States of Minnesota and Iowa and all traffic moved by defendant between the Village of Hardwick and the City of Minneapolis in said State of Minnesota must be and was carried over defendant's line of railway through the States of Minnesota and Iowa. It was

not possible for this defendant to move any traffic between the said village of Hardwick and said cities of Chicago, Davenport or Minneapolis respectively, except through said states as herein set forth, as this plaintiff well knew when it offered or delivered to the defendant any grain or other article of commerce for transportation between said stations. A true and correct map of the lines of railway of this defendant now or at any time operated by it, showing the states traversed by said railroad and the location of the various towns, cities and villages along its railway is hereto attached and made a part of this answer and marked Exhibit "A."

Now, down to this point, gentlemen, in this answer there is no contention. The plaintiff concedes that all the allegations of the answer that I have read you are true. Now, follows an allegation that is disputed. The defendant further avers that at the time when plaintiff alleges that it demanded the cars to be furnished in order to move said grain to destination it was at a season when
24 because of the volume of grain and merchandise which this defendant was required to transport movement of freight was difficult, congested and embarrassed. At said times mentioned in the complaint there was upon the lines of the defendant's railway, and elsewhere an unusual and unprecedented congestion of traffic which this defendant could not have foreseen and which it was beyond the power of the defendant to relieve. This defendant was at said times mentioned in the complaint and hereinbefore referred to, unable to furnish at once all the cars desired by plaintiff herein, by reason of their temporary and unavoidable detention and use in other states while engaged in moving interstate traffic and commerce. This defendant had theretofore at great cost and expense purchased a large supply of cars, much more than sufficient to move normal traffic upon its lines of railway, with the expectation of furnishing its patrons, including this plaintiff, with such a number of cars as would adequately and promptly transport all traffic offered to it, but at said times the volume of traffic over this defendant and other railway companies in the so-called Northwestern States of which the State of Minnesota is one, was greater than ever before or since in the history of Minnesota railroading; and notwithstanding the most diligent efforts so to do it was beyond the power of this defendant to provide for immediate movement of such traffic by reason of the foregoing premises, but said railway company did at all times provide the said plaintiff with its due and proper
25 proportion of cars, and in a short time and as soon as relieved from said car shortage and at the earliest time practicable and within the power of defendant did furnish all the cars required by plaintiff. To have sooner supplied said cars would have compelled this defendant as a common carrier to have discriminated against other interstate traffic and interstate commerce which this defendant was required to transport and such discrimination would have been contrary to the instructions, rules and orders of the interstate commerce commission of the United States in that behalf duly promulgated. Solely by reason of said freight congestion and the constant scarcity of cars and their use in moving traffic and commerce be-

tween the states and from causes not within the power and control of this defendant to in any manner prevent, a delay in furnishing certain cars desired by plaintiff occurred. There are certain other allegations in this answer, gentlemen, that are not material, so far as you are concerned. And final-, there follows a demand for judgment in favor of the defendant.

To this answer the plaintiff here has interposed a reply in which it admits all the allegations contained on the first page and all the allegations on the second page down to the paragraph beginning with the words "The defendant further avers that at the time plaintiff," et cetera. Second, denies all other allegations of the answer.

Now, these, gentlemen, are the issues in this case as made by the parties. It has been stipulated in this case by the respective
26 counsel that if the plaintiff here is entitled to recover its verdict outside of attorney's fees shall be the sum of $218; and it has also been stipulated here that the pleadings that I have read you shall be submitted to you and that you be allowed to take them with you to your room to read, if you desire, when you retire thereto.

These disputed claims here of the parties raise questions of fact for you to decide. The jurors are always the sole judge of the facts, and a question of fact arises in a lawsuit for a jury to determine whenever the witnesses disagree, whenever they tell different stories; and in this case every such matter is wholly for your consideration. This being so on no account must any of you think or act upon the supposition, or believe from anything that I may have said during the trial or from anything that I shall say hereafter that I have any opinion or suggestion concerning any of these matters in dispute; neither must any of you think or believe that I have any opinion or suggestion as to which of these parties should have your verdict. The verdict here is for you gentlemen to render. Of course it must be done under the evidence as you have heard it and just as nearly in accord with the instructions of the Court as is possible. So far as determining the law is concerned, you have no concern whatever. It is the duty of the judge who presides at the trial to determine the questions of law that arise, and as he determines them the
27 jury is bound. You should accept these instructions to the exclusion of every other thing and follow them exactly as given to the best of your ability, remembering always that no juror can possibly follow his oath or obey the laws of the state unless he takes the law just as the judge gives it to him. With the facts the judge has no concern, those are for the jury to decide; with the law so far as its decision is concerned the jury have no concern; they should take that as the judge gives it. In this case it appears that there is a corporation on both sides, a corporation plaintiff and a corporation defendant. I take it it is unnecessary for me to say to you, gentlemen, that these parties stand exactly even in this court; neither is entitled to any more or any less consideration at your hands or mine than the other. Now, I do not intend here, gentlemen, to go over this evidence. It is not very long; you have listened to it very attentively. I have no doubt you are quite as familiar with it as I am. The gentlemen who represents these parties here in court

have quite thoroughly reviewed it and doubtless nothing would be accomplished by my simply going over it again in detail.

In the year 1907 the Legislature of this state passed a statute known as Chapter 23 of the Laws of 1907. This was new legislation. We never had had anything like it in this state before. The action that we have been trying here is brought exclusively under this statute. If the statute did not exist this suit could not be maintained. It is what we call a statutory action, which means that
28 it is one which is brought under a statute and because a special statute authorized it. The provision of this statute as here material, read as follows: When the owner, manager or shipper of any freight of any kind shall make application in writing to any superintendent, agent or other person in charge of transportation of any railroad company at any point that cars are desired in or upon which to ship any freight, it shall be the duty of the company to supply the number of cars so required at the point indicated in the application within a reasonable time thereafter; not to exceed 48 hours at terminal points, and 72 hours at intermediate points, from the receipt of such application, Sundays and legal holidays excepted and shall supply such cars to the person or persons so applying therefor in the order in which such applications are made and without giving preference to any person; provided that if the application be for more than three cars the railroad company may have one additional day in which to supply each additional car so ordered. Said application for cars shall be in writing, stating the number of cars wanted, the time and place desired, and said application shall state the character of freight and its final destination. To facilitate the making of the application in writing every railroad company doing business in the state shall provide suitable blanks for that purpose to be kept at all freight offices and it shall be the duty of each said railroad company upon the request of the applicant, to furnish him a duplicate of such application. When cars are
29 applied for under the provisions this chapter, if they are not furnished within the time herein stated the railroad company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of one dollar per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, together with all damages said applicant may have sustained. The period during which the movement of freight or furnishing cars is suspended on account of strikes, public calamities, accident, or any cause not within the power of the railroad company to prevent, shall be added to the free time allowed in this act and counted as additional free time.

Now, so far as this case is concerned, gentlemen, the two most material provisions of this act are as follows—and I will simply re-read to you a part of what I have read before: When cars are applied for under the provisions of this chapter, if they are not furnished within the time herein stated the railroad company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of one dollar per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, together with all damages such applicant may have sustained. The

period during which the movement of freight or furnishing cars is suspended on account of strikes, public calamities, accident, or any cause not within the power of the railroad company to prevent, shall be added to the free time allowed in this act as additional free time.

30 Now, it is the claim of the defendant here, the railroad company, that they have presented such a state of facts here under the evidence as to add to the free time allowed by this chapter, namely 72 hours, to furnish the plaintiff cars sufficient to cover all the period between the time the cars were ordered and the time that they were in fact furnished. This claim the plaintiff denies. The legislature of this state intended by this act as it applies to the facts of this particular case, and it had no power as applied to the facts in this particular case to go farther, to bind the defendant company to furnish to its customers sufficient cars for its usual and ordinary fall traffic, and this only when it was not prevented from so doing by accident or some cause not within the power of the railroad company to prevent; and unless you find from the evidence and under the instructions here that the defendant failed to furnish the plaintiff cars only because it failed to furnish sufficient cars for its usual and ordinary fall traffic and also that this falure was not caused by accident or by some cause not within the power of the defendant to prevent, the plaintiff cannot recover in this case; and if you do so find the plaintiff should have the verdict. In other words, but expressing the same thought, if you find from the evidence and under the instructions that the defendant here, the railway company, failed to furnish sufficient cars for its usual and ordinary fall traffic, and that it was not prevented from doing so by accident or some cause not within its power to prevent, the

31 plaintiff should recover; and otherwise it cannot. A sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states or places, or accidents to rolling stock of the company, panics, are each and all within the meaning of the words "accident or some cause not within the power of the defendant to prevent" as used in the statute that I have read you, and under these instructions.

The burden of proof in this case rests upon the defendant, the railway company here, to show you that the failure to furnish cars to plaintiff was because of accident or some cause not within its power to prevent. The burden of proof here rests upon the plaintiff to show you fairly that the defendant failed to furnish sufficient cars for its usual and ordinary traffic. In this case you should find according as you shall be satisfied of the truth of the matters of controversy, by a preponderance of the evidence. Before finding in favor of the party on whom the burden of proof rests to establish any fact you should be satisfied of the existence thereof to a reasonable certainty. Preponderance of the evidence means simply as outweighing in convincing force. Something depends in this case, as in practically every case tried to a jury, upon what credit you will give the several witnesses who have here testified. It is for you to say which of these witnesses are truthful and which untruthful, if

you believe that such conditions exist. It is also for you to say which of these witnesses you think are correct and which
32 mistaken in their statements, if such conditions exist. To get at what a witness' evidence is worth you ought to consider the reasonableness of the story that he tells you, his knowledge or lack of knowledge concerning the matters that he tells about, his recollection or lack of recollection of the matters that he refers to; how far he is corroborated by other witnesses or lacks in corroboration; the interest that a witness has in the event of the suit or his lack of interest; and the jury always has the right to take into account the reasonableness of the story that the witness tells when you view it in the light of all the surrounding circumstances of the transaction involved that the evidence discloses.

For your convenience in this case I have prepared two forms of verdict. If you find for the plaintiff you will use the long form which I now show you. It is complete, exactly as it reads. If you find in favor of the plaintiff all that you have to do is for your foreman to sign it before the word foreman and your work in that regard is done. If you find for the defendant, the railroad company, use the short form of verdict which is also complete when your foreman signs it. Either side may have any exceptions now that they desire.

Swear an officer.

After due deliberation, the jury returned the following verdict:

33 (Title of Cause.)

*Verdict.*

We, the jury empanelled and sworn in the above entitled action, find for plaintiff and assess its damages in the sum of two hundred and sixty-eight dollars (268)—$218 of the above amount as damages and $50 thereof as attorney's fee, in all $268.00.

Dated at Luverne, Minn., this 19th day of March, 1909.

A. L. PARKER, *Foreman.*

*Notice.*

To C. H. Christopherson, Attorney for Plaintiff:

You will please take notice that the foregoing is the case or bill of exceptions proposed by the defendant herein, preliminary to allowance and settlement by the Court, as containing all motions, rulings, exceptions and all proceedings had and taken upon the trial of this cause.

Dated May 3, 1909.

A. J. DALEY,
*Luverne, Minn.;*
STRINGER & SEYMOUR,
*St. Paul, Minn.,*
*Attorneys for Defendant.*

34 *Stipulation.*

It is stipulated and agreed betwen the parties that the judge of this Court who tried the cause may without further notice or application make the usual certification signing, settling and allowing the foregoing as a case or bill of exceptions containing all motions, rulings, exceptions and all proceedings had and taken upon the trial of this case.

Dated May 3rd, 1909.

C. H. CHRISTOPHERSON,
*Plaintiff's Attorney.*
A. J. DALEY &
STRINGER & SEYMOUR,
*Defendant's Attorneys.*

*Certificate.*

The undersigned, judge, who presided at the trial of this cause, hereby certifies that the foregoing having been examined and found conformable to the truth is hereby signed, settled, and allowed as a case or bill of exceptions. The foregoing contains all motions, rulings, exceptions and all proceedings had and taken upon the trial of this cause.

Dated at Luverne, Minnesota, May 6th, 1909.

P. E. BROWN,
*District Judge.*

35 (Title of Cause.)

*Notice of Motion for New Trial.*

To C. H. Christopherson, Attorney for Plaintiff, Luverne, Minnesota:

You will please take notice, That at the General Court Room in Rock County Court House, in the village of Luverne, Rock County, Minnesota, on Saturday, the 15th day of May, 1909, at 2 o'clock in the afternoon, the defendant will make a motion to vacate and set aside the verdict returned in this cause in favor of the plaintiff and against the defendant herein, and to grant the defendant a new trial, upon the following grounds, to-wit:

(*a*) The verdict is not justified by the evidence.

(*b*) The verdict is contrary to law.

(*c*) Because of errors of law occurring at the trial and excepted to at the time of such trial.

(*d*) The act of 1907, chapter 23, commonly known as the Reciprocal Demurrage Law of Minnesota does not apply to interstate shipments or consignments offered to or received by common carriers and, so far as may concern interstate commerce, is invalid and ineffectual and in violation of the laws of Congress and of the Constitution of the United States, especially the so-called commerce clause, in section 8, article 1, of the United States Constitution.

(*e*) Said Chapter 23 of the Act of 1907, commonly known as the Reciprocal Demurrage Law of Minnesota, does not apply to the shipments or consignments alleged to have been offered by
36 the plaintiff to the defendant herein, and said statute so far as may concern such proffered shipments or consignments, is invalid and ineffectual, being an obstruction and an attempted regulation of inter-state commerce in violation of Section 8, Article 1, of the United States Constitution and the Laws of Congress of the United States.

(*f*) The Act of 1907 by virtue of the provisions of which this suit is brought is invalid and ineffectual so far as may concern the inter-state shipments and consignments offered the defendant in this case, and is in violation of the laws of the Congress and of the United States Constitution, and especially Section 1, Article 14, and because said Act if enforced would deprive this defendant of its property without due process of law, and would deny the defendant the equal protection of the laws.

(*g*) The court erred in denying defendant's motion to dismiss the action after the conclusion of plaintiff's testimony.

(*h*) The court erred in refusing to charge the jury as requested by the defendant after the testimony of both parties was closed. (See Case and Bill of Exceptions, subdivisions 1, 2, 3 and 4, Defendant's Requests to Charge the Jury.)

Said motion will be made upon all the files and records
37 in this action and upon the Case and Bill of Exceptions filed in this cause.

Dated Luverne, May 6th, 1909.

A. J. DALEY,
*Luverne, Minnesota.*
STRINGER & SEYMOUR,
306 *Nat'l Ger. Am. Bank Building, St. Paul, Minn.,*
*Attorneys for Defendant.*

Due and timely service of the foregoing notice of motion is hereby admitted this 6th day of May, 1909.

C. H. CHRISTOPHERSON,
*Attorney for Plaintiff.*

(Title of Cause.)

*Order.*

A motion for a new trial having been duly made by the defendant, A. J. Daley and Stringer & Seymour, appearing for the defendant and C. H. Christopherson appearing for the plaintiff in opposition, it is ordered, that the same be and it is hereby denied.

Dated July 19, 1909.

P. E. BROWN,
*District Judge.*

38 *Mem.*

When this cause was here on demurrer it was held that Chapter 23, Laws of 1907, was constitutional as applied to the alleged cause of action, and the following cases were cited to support the ruling. State v. Wagner, 77 Minn. 483 (500); State v. Canada, 85 Minn. 457 (460); State v. Board, 87 Minn. 325 (334); Houston v. Mayes, 201 U. S. 321, Patterson v. Mo. Pac. 15 R. A. (N. S.) 733.

In considering the cause on this applicationI I believe that the rule stated in W. U. Tel. Co. v. James, 162 U. S. 650, and the observations in the opinion in the Mayes case on page 328, as follows: "That notwithstanding the exclusive nature of this power (the power of Congress to regulate interstate commerce) the States may, in the exercise of their police power, make reasonable rules with regard to the methods of carrying on interstate business. * * * Of course, such rules are inoperative if conflicting with regulations upon the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce," controls the law of this case. This act simply imposes a penalty upon the defendant for its failure to perform a common law duty to furnish sufficient cars for its usual and ordinary traffic, and rests upon the police power. In the nature of things such penalties may, and to be reasonable perhaps should, differ in amount in the states, for conditions are dissimilar.

39 There may be greater need of prompt service in one state than in another, and one class of freight might reasonably require quicker service than another class. The gist of the validity of the legislation is that it conforms to the rule stated and above quoted in the Mayes case.

"The subject matter (here involved) embraced in the statutes is not of such national character as to require uniform regulation of legislation applicable to all states, so as to make the power of Congress thereunder exclusive."

The following cases are instructive.

Southern Railway v. Virginia, 17 L. R. A. (N. S.) 364, and especially paragraph four on page 369, and the concurring opinion. Pittsburgh, C. C. & L. Ry. Co. v. State, 87 N. E. Rep. 1034 (Ind.) Charles v. Atlantic, 125 Am. St. Rep. 762.

I do not think Congress has legislated on the subject matter here involved.

BROWN, *Judge.*

Filed July 19, 1909. O. E. Ferguson, Clerk.

(Title of Cause.)

*Judgment.*

This cause being on the calendar for trial at the General March, 1909, Term of said Court, duly came on to be tried before the Court

and a jury impaneled and sworn to try the same, which said jury did, on the 19th day of March, 1909, duly render a verdict herein.

Now, pursuant to said verdict and upon the motion of
40 C. H. Christopherson, Esq., plaintiff's attorney, it is hereby considered and adjudged that the plaintiff recover of the defendant the sum of $222.54 the amount of damages awarded by said verdict with interest to date hereof together with the further sum of $79.82, attorney's fees, costs and disbursements ($50.00 of said last mentioned sum being the attorney fee allowed by the verdict and $29.82 the costs and disbursements taxed and allowed), making in all the sum of $302.36.

Dated July 24th, 1909.

By the Court:

O. E. FERGUSON,
*Clerk of said Court.*

(Title of Cause.)

*Appeal to the Supreme Court.*

To C. H. Christopherson, Attorney for Plaintiff, Luverne, Minnesota:

You will please take notice, That the defendant, the Chicago, Rock Island and Pacific Railway Company appeals to the Supreme Court of the State of Minnesota, from the judgment of the District Court of Rock County, Minnesota, entered July 24, 1909, in favor of the plaintiff and against the defendant herein. The defendant appeals from said judgment and each and every part thereof.

Dated at St. Paul, Minnesota, July 26, 1909.

A. J. DALEY,
*Luverne, Minnesota.*
STRINGER & SEYMOUR,
*St. Paul, Minnesota,*
*Attorneys for Defendant.*

Due service of the within admitted this 27th day of July, 1909.

C. H. CHRISTOPHERSON,
*Attorney for Plaintiff.*
O. E. FERGUSON,
*Clerk of the District Court, Rock County, Minn.*

41 STATE OF MINNESOTA,
*County of Rock:*

District Court, Thirteenth Judicial District.

THE HARDWICK FARMERS ELEVATOR COMPANY, Plaintiff,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellant.

It is stipulated and agreed by and between the parties to this action, plaintiff and defendant respectfully, that the within Paper Book may be returned by the Clerk of the District Court in and for the County of Rock, State of Minnesota, as and for his full and complete transcript of proceedings and return to the Supreme Court of Minnesota.

Dated, Luverne, Minn., September 10th, 1909.

C. H. CHRISTOPHERSON,
*Attorney for Plaintiff.*
A. J. DALEY AND
STRINGER & SEYMORE,
*Attorneys for Defendant.*

STATE OF MINNESOTA,
*County of Rock, ss:*

I, the undersigned, Clerk of the District Court in and for the County of Rock, pursuant to the foregoing stipulation do hereby certify the foregoing and return the same as and for my return to the Supreme Court of the State of Minnesota, in this cause.

Dated at Luverne, Minnesota, September 13, 1909.

[NOTARIAL SEAL.]

O. E. FERGUSON,
*Clerk of the District Court*
*of Rock County, Minnesota.*

42 State of Minnesota Supreme Court.

No. 16362.

HARDWICK FARMERS ELEVATOR COMPANY, Respondent,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellant.

*Opinion and Syllabus.*

Filed January 28th, 1910. I. A. Caswell, Clerk.

October Term, A. D. 1909.

Jaggard, J.

43 16362.

State of Minnesota Supreme Court, October Term, A. D. 1909.

No. 152.

THE HARDWICK FARMERS ELEVATOR COMPANY, Respondent,
v.
CHICAGO, ROCK ISLAND & PAC. RY. COMPANY, Appellant.

*Syllabus.*

Chap. 23 Laws of Minn. 1907, imposed the duty upon any railroad company to furnish suitable cars to *or* all persons applying therefor in good faith; to provide and keep suitable facilities for handling the same; to receive and transport empty or loaded cars furnished by any connecting road; to furnish to the shipper the number of cars applied for in writing within 48 hours at terminal points and 72 hours at intermediate points from the receipt of the application. Section 11 provided: "The period during which the movement of freight or furnishing cars is suspended on account of strikes, public calamities, accident, or any cause not within the power of the railroad company to prevent, or during which the loading or unloading of freight by shipper or consignee is delayed by reason of inclement weather which would make loading or unloading impracticable, or any cause not in the power of said shipper or consignee to prevent, shall be added to the free time allowed in this act and counted as additional free time." In addition to dam-
ages the carrier was made responsible to the shipper for the
44 sum of one dollar per day for every car failed to be furnished
together with reasonable attorney's fees for bringing such suit to be taxed and paid as costs.

In an action brought thereunder the defendant railroad company asserted as a first defense that it was reasonably within the terms

of the act because a freight congestion had rendered it impossible for defendant to furnish cars sooner than it did. It is held:

That this was a question of fact; and that the verdict of the jury for plaintiff must be sustained inasmuch as this court was not furnished with the transcript of the testimony and could not review the evidence.

For a second defense, defendant asserted the unconstitutionality of the law as an attempted regulation of interstate commerce and as failing to comply with the Federal requirement concerning "due process of law." It is held:

(1) The law by its terms applied to inter and intra state commerce. The merchandise transported between two points within this state which was carried by defendant's lines through a neighboring state and back into this state was interstate commerce.

(2) The expression "any cause not within the power of the shipper or consignee to prevent" and the term "accident" which occurred in the enumerated cases excepted from the operation of the act are to be broadly construed; and include all causes not reasonably within the power of the carrier to prevent.

(3) The power of the government may be divided into four classes: (1) those which belong exclusively to the states; (2) those which belong exclusively to the national government; (3) those which may be exercised concurrently and independently by both; (4) those which may be exercised by the states but only until congress shall see fit to act upon the subject.

(4) State laws enacted in the exercise of the police power and indirectly and remotely affecting interstate commerce being in aid thereof and not a burden thereon may be within the fourth class of cases and enforceable unless superseded by some act of Congress; if they are reasonable in their operation.

(5) The so-called reciprocal demurrage law was designed and in operation tended to insure the prompt performance by the carrier of its common law duty to furnish cars for transportation of freight, and was not displaced by the Interstate Commerce Act as amended by the Hepburn Law, primarily intended to secure reasonable rates and to prevent unjust discriminations.

(6) The law made sufficient allowance for practical difficulties, in railroad management in its enumeration of exceptions to liability and was reasonable and constitutional. Houston R. R. v. Mayes, 26 S. C. R. 491 followed and applied.

Third. The provision requiring the payment of reasonable attorney's fees is not invalid because it imposes a charge on carriers and not on debtors generally inasmuch as the statute was enacted in the exercise of the police power of the state.

Affirmed.

46 16362.

State of Minnesota Supreme Court, October Term, A. D. 1909.

No. 152.

THE HARDWICK FARMERS ELEVATOR COMPANY, Respondent,
v.
CHICAGO, ROCK ISLAND & PACIFIC RY. CO., Appellant.

*Opinion.*

This was an action brought by plaintiff and respondent elevator company against defendant and appellant railroad company under the so-called reciprocal demurrage law, Chap. 23, Laws of Minn. 1907 to recover one dollar a day for every day on which defendant failed at specified times to furnish cars to plaintiff for the movement of grain from a point in Minnesota to other points in Minnesota and to points in other states. The case was tried to a jury which returned a verdict in the sum of $218 being one dollar for every day's delay and $50 as attorney's fees. From judgment entered therein this appeal was taken. Other cases involving the validity of the same law were submitted at the same time. All material, relevant points made by various counsel are intended to be included in the opinion which follows.

So far as here involved Chap. 23 is as follows:

"SECTION 1. It shall be the duty of any railroad company to furnish suitable car or cars to every and all persons, without dis-
47 crimination, who may apply therefor in good faith for the transportation of any and all kinds of freight, * * *, and also to receive and transport in like manner the empty or loaded cars furnished by any connecting railroad, to be delivered at any station or stations on the line of its road, to be loaded or discharged, or reloaded and returned to the road so connected * * *

When the owner, manager or shipper of any freight of any kind shall make application in writing to any superintendent, agent, or other person in charge of transportation of any railroad company, at any point that cars are desired in or upon which to ship any freight, it shall be the duty of such railroad company to supply the number of cars so required at the point indicated in the application within a reasonable time thereafter, not to exceed forty-eight hours at terminal points and seventy-two hours at intermediate points, from the receipt of such application, Sundays and legal holidays excepted, and shall supply such cars to the person or persons so applying therefor in the order in which such applications are made, without giving preference to any person:"

* * * * * * *

"When cars are applied for under the provisions of this chapter, if they are not furnished within the time herein stated, the railroad company so failing to furnish them shall forfeit to the party or

parties so applying for them the sum of one dollar per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, together with all damages such applicant may have sustained.

* * * * * * *

SEC. 10. The payment by said railroad company of demurrage provided in this act, shall in no way invalidate or offset any
48 claim any shipper or consignee may have or make for damages occasioned by delay on the part of such railroad company, or other cause, but shall be a further remedy and in addition to any already existing. Nor shall anything herein contained be held to lessen the duties of any common carrier in the shipment of live stock or other perishable property.

SEC. 11. The period during which the movement of freight or furnishing cars is suspended on account of strikes, public calamities, accident, or any cause not within the power of the railroad company to prevent, or during which the loading or unloading of freight by shipper or consignee is delayed by reason of inclement weather which would make loading or unloading impracticable, or any cause not in the power of said shipper or consignee to prevent, shall be added to the free time allowed in this act and counted as additional free time.

* * * * * * *

SEC. 13. When suit is brought to collect any of the damages, forfeitures or demurrage charges, provided for in this act, said suit may be brought in any court in this state having jurisdiction of the subject matter and parties under the then existing cause; and if the plaintiff therein recover judgment such plaintiff shall also recover a reasonable attorney's fee for bringing such suit, to be taxed as costs in other cases and paid as other costs by defendant in such suit."

JAGGARD, J., after making the foregoing statement:

The defenses interposed were first that because of a freight
49 congestion, one of the greatest in the history of commerce, it was impossible for defendant to furnish cars any sooner than it did. On the evidence adduced, the trial court submitted to the jury the question whether or not it was within the power of the railroad company to have furnished the cars when demanded. The verdict of the jury for plaintiff must be sustained on this point. For this court was not furnished with a transcript of the testimony. No question on the subject is therefore presented for our consideration. The verdict must stand in the absence of other objection. Meade v. Billings, 40 Minn. 505; Brackett v. Cunningham, 44 Minn. 498.

The second defense asserted was that the law was unconstitutional under the State and Federal constitutions especially as an attempted regulation of interstate commerce in violation of Sec. 8 Art. 1, U. S. Cons. and the laws of Congress and has failed to comply with the acts of Congress and Sec. 1 Art. 14, concerning "due process of law."

(1) The commerce was interstate. Even the merchandise trans-

ported between two points within this state was conveyed by lines of the defendant through a neighboring state, to its destination within this state and was therefore not intra-state commerce. See State v. R. R. 40 M. 267; Patterson v. R. R. Co. 15 L. R. A. N. S. 733; Hanley v. R. R. Co., 187 U. S. 617, 23 S. C. R. 214. This conclusion follows also from the admissions of the pleadings and the unchallenged charge of the trial court.

(2) The law needs little construction. By its terms it applies to both intra and inter-state commerce. Its language is clear enough except Sec. 11 which enumerates the instances in which the
50 period during which the movement of freight the furnishing of cars is suspended. It is thereby made a defense in an action to enforce one dollar a day demurrage that certain conditions in fact exist. In their enumeration, the general expression "or any cause not within the power of the railroad company to prevent" is preceded by "strikes, public calamities, accidents" and is followed by "inclement weather and by any cause not within the power of the shipper or consignee to prevent." If these words had been placed at the end instead of the middle of the sentence no considerable difficulty would be presented. The exceptional circumstances, however, which precede and follow are substantially of the same nature; they all belong to the class of causes of delay over which the railroad company had no control and for the effects of which it could not reasonably be held accountable. The reason for the application of the familiar rule ejusdum generis fails; or it may be more accurate to say that its application results in the construction for which the state contends. Such a conclusion moreover is in furtherance and not in contradiction of the natural sense and obvious meaning of the words under consideration. It is to be noted that the restrictive word "other," which has primarily germinated the doctrine of ejusdum generis, is not used but the inclusive word "any." As to the broad construction to be given wherever "other" has been used see U. S. v. Bitty, 208 U. S. 393. State v. W. U. Tel. Co. 96 Minn. 13; Detroit R. R. v. Common Con., 125 Mich. 673; State v. W. U. Tel. Co., 65 S. W. 775 U. S. Again as will subsequently appear herein if the language be thus broadly construed the act will be constitutional, if it be narrowly construed it will be unconstitutional. There is no doubt as to the duty of the court
51 to adopt the view which will sustain the law.

The expression naturally refers to causes not absolutely but reasonably within the power of the railroad company to prevent. Any other meaning would be strained, would vitiate the law, would be opposed to common sense and would oppose authority. Darlington v. R. R. Co., 116 S. W. 530 (involving the construction of a reciprocal demurrage law) is specific as to principle. It would be idle to collate cases.

Finally the word "accident" is significant. In Patterson v. R. R. 15 L. R. A. N. S. 733, 94 Pac. 138, a similar question was presented to the court and "unavoidable accident" was interpreted to mean "unavoidable by the railroad sought to be penalized."

Construing the clause as a whole, we conclude that the enumerated

defenses extend to any cause beyond the power of the railroad company to reasonably prevent. It includes as excepted cases all the contingencies recognized by the Texas statute involved in Houston &c., Ry. Co. v. Mayes 26 S. C. Ry. 491 (Post), all those set forth in that opinion for failure to except which that statute was there held invalid, the defense here asserted and others of the same kind. Thus it includes the objection by one of the defendants in another similar action that the statute entirely disregarded the quantity of freight to be loaded upon car or cars, the number of cars and the side track facilities which the particular shipper may have to handle whereby the carrier might be unjustly deprived of the use of its surplus cars required to be furnished above those which can be used. If, however, the facts in such case should show that
52 it was unreasonable to charge demurrage, the carrier would have a complete defense; if the facts should show*ed* that it was reasonable to impose the charge the carrier would have no just ground of complaint. Darlington v. R. R. 116 S. W. 830 to which counsel for the company refers us in this connection is in no wise inconsistent.

(3) The so-called reciprocal demurrage law as thus construed is not unconstitutional. In ex parte McNeil, 13 Wall. 236, Mr. Justice Swayne said: "In the complex system of polity which prevails in this country the powers of government may be divided into four classes (1) Those which belong exclusively to the states. (2) Those which belong exclusively to the national government. (3) Those which may be exercised concurrently and independently by both. (4) Those which may be exercised by the States but only until Congress may see fit to act upon the subject." Whatever effect subsequent decisions may have had upon the exact lines of demarcation between those classes of cases, it is certain that between the one pole of facts which clearly constitute a clear violation of Federal power in the regulation of interstate commerce and the opposed pole of those which bring a given instance within the unquestioned power of *of* the states, there is a definitely recognized intermediate zone in which state laws enacted in the exercise of the police power which indirectly and remotely affect interstate and foreign commerce, are to be enforced unless "they are superceded and and displaced by some act of Congress." Hennington v. Ga. 163 U. S. 299; R. R. Co. v. Haver, 168 U. S. 613, 18 S. C. 488; cases collected in
53 Pittsburg Co. v. State, 87 N. E. 1034 at 1040. Involving a "full crew" act). "Such laws are not within prohibited regulation of interstate commerce and it is only when they operate as such in the circumstances of their operation and conflict with the express or presumed will of congress exercised on the subject that they can be required to give way to the paramount authority of the Constitution of the U. S." Gray J. in Gladden v. Minn. 166 U. S. 427 and see R. R. Co. v. Ohio, 173 U. S. 301. Many such cases will be found summarized in R. R. Co. v. People, 177 U. S. 514. McNeil v. R. R. Co. 26 S. C. R. 722 is in accord;" nonetheless because it also asserts the conserve proposition "that any regulation of such subject made by state or under its authority which directly burdens in-

terstate commerce, is a regulation of such commerce, and repugnant to the Constitution of the U. S." Our examination of the relevant decisions has convinced us that the current assertion of the invasion upon the traditional functions of the state by the decisions of the Federal Supreme Court on this matter is unfounded and that the extent to which wide police powers over the instrumentalities of transportation employed in interstate and foreign business has been preserved to the states is impressive. See Calvert Regulation of Commerce IV.

(*b*) The law here in controversy is fairly within that middle zone. It conflicts with no congressional action previously taken or reasonably presumed; for the primary purpose of the inter-state commerce act as amended by the act of June 29, 1906 (Hepburn Law) was to secure reasonable rates and to prevent unjust discriminations. It affects interstate commerce in an indirect or re-
54 mote manner only. Neither its purpose nor its operation constitutes a burden on such commerce. Its enforcement must tend to secure the prompt performance by the carrier of its common law duty to furnish cars for transportation of freight and thus to add to the volume of matter to be transported within and without the state. Without euphemism it is in aid of commerce of both kinds. As was said in Segars v. S. A. Line, 73 S. C. 712 "the penalty is but a means to that end," and see Charles v. Co. 58 S. C. 927; 125 Am. St. 762. As hereinbefore construed, it conforms to the Federal test of reasonableness (as will subsequently be set forth.)

(*c*) There are obvious practical advantages in permitting the states to legislate on this subject. So to do secures the flexibility of local legislation and the certain conformity with Federal standard. In the nature of things the legislatures of the various states are peculiarly familiar with and in an especially good position to determine the expedience of such a law in the geographical and commercial situation presented, with due reference to the density of population, nearness to markets the productiveness of the region, the perishability of products, climatic conditions, the nature and extent of actual railroad facilities the difficulties of movement, the variation in demand and with due reference to many other facts involved in the problem of transportation. Consistent determination of the legal aspects of such a law is certainly secured because the ultimate decisions of all essential questions arising under it rest not with the courts of the various states but with the highest Federal tribunal.

It appears probable that uniform Congressional legislation
55 would lack the flexibility and adaptability of local laws. * * *

"The failure of the states to adopt regulations to meet a supposed need, either by indifference to the wrong or delinquency or by such an exercise of the power that, on account of the absolute requirements imposed, a regulation cannot pass the supreme test of reasonableness, results in agitation for federal regulation of matters concerning which the power of Congress is undoubted. There would be no need to invoke the exercise of the federal power in such cases if states adopted reasonable regulations to satisfy local requirements

or opinion." Calvert on Regulation of Commerce IV. It is certain that if the determination of legal issues was left to the state courts there would be variety and confusion in decision. The present system is capable of proving an advantage both to the carrier and shipper.

(*e*) The authorities sustain the constitutionality of the law. The decisions of the Federal Supreme Court control absolutely. In Houston R. R. v. Mayes, 26 S. C. 491, the court in that case considered a railroad demurrage law enacted by the legislature of Texas which for all purposes here involved was the same as the statute under consideration except that (1) the amount charged for each day's delay was $25 and (2) that the enumerated cases exempted from its operation was extremely limited. That decision determines (1) that in the present state of actual and presumed congressional action, the State is able in the exercise of its police power to make reasonable rules in regard to the method of carrying on intrastate business; and to make laws compelling railroads to furnish
56 adequate facilities for transportation of both freight and passengers; (2) that a demurrage law which undertakes to enumerate exceptions to liability must make sufficient allowance for practical difficulties in railroad operation; (3) that the Texas statute was "not far from the line of proper police regulations," but that it failed to recognize as proper defenses many contingencies for the results of which it was unreasonable to hold the carrier responsible. See Calvert Regulation of Commerce, 95-55. It follows that the present law is valid.

The interpretation which other courts have placed on such a law has not been consistent but taken as a whole tends to sustain this conclusion. Oliver v. R. R. 117 S. W. 238, in an opinion by Norton, J. ("Special Judge"), regarded the Mayes case as refusing to enforce the law upon the ground that the requirement that cars be furnished transcended the rights of the state to burden interstate commerce. The law therefore was invalid as to interstate commerce but valid as to intrastate commerce. We think, that the opinion plainly misconstrued the Mayes case. Cf. So. R. R. Co. vs. Melton, 65 S. E. 665 as to intrastate commerce.

In St. L. R. R. v. Hampton, 162 Fed. 693, the opinion by a district judge was oral. It held that an Arkansas law was an interference with interstate commerce. Its requirement to furnish cars was absolute and made no exception for cases of a sudden congestion of traffic, actual inability to furnish cars by reason of their temporary detention in other states or in other places within the same state, none for interference with traffic by wrecks, accidents or strikes. In this regard it was primarily and obviously different from the
57 present statute. Moreover that the statute there construed involved a penalty of $5 per day.

McNeil v. R. R. 26 S. C. R. 722 concerned a state commissioner's order compelling a railroad company to deliver cars containing interstate shipments beyond its right of way to a private siding. This was held unlawful interference with interstate commerce. This case

is evidently not specifically in point. Nothing in the opinion on the general subject seems to indicate any leaning to defendant's view.

The conclusion here reached has been specifically sanctioned. In Patterson v. R. R. Co. 94 Pac. 138, 15 L. R. A. (N. S.) 733, 13 Am. & Eng. An. Cases—and valuable note, a reciprocal demurrage law was held valid although it affected interstate business; it was held to be an aid not a burden to such commerce.

It was distinguished from the Texas case (1) in imposing a penalty of one dollar a day as here instead of $25 a day an amount "merely nominal and not sufficient to furnish any inducement to order cars not actually needed," and (2) because while the Texas case contained inadequate enumeration of exceptions the Kansas law recognized as a defense any "unavoidable cause."

In So. R. R. v. Com. 60 S. E. 70; 17 L. R. A. N. S. 364; decided in 1908 subsequent to any congressional action on the subject, a rule promulgated by the state corporation commission was held unreasonable and void as applied to shipments outside of the state because it imposed "even a greater burden upon interstate commerce than the provisions of the Texas law." That court consisted of five judges. All concurred in the conclusion that
58 the particular rule was invalid. Three judges wrote concurring opinions the effect of which is that it is within the power of the state under the Mayes case to make reasonable regulation as to the furnishing of cars by railroad companies not only for intra but for interstate commerce and that the crucial test of license to that effect was its reasonableness. The opinion itself contains a direct statement of this view of the law. With its application to the particular circumstances there in issue we have no present concern.

To the same effect is Stone v. R. R. 56 S. E. 9339 which also construed the point in the Mayes case as pressing an opinion that the statute was not far from the line of police regulation but fell on the wrong side of the line. And see Yazoo & Co. v. Keystone Co. 43 So. 605; Atl. Line v. Con. 43 S. E. 911; R. R. Co. v. Milton, 65 So. 665 at 674; Darlington Co. v. R. R. Co. 116 S. W. 530 in which Graves J., said at 535 "that the state has a right within certain limits to regulate demurrage charges is not seriously disputed, nor could it be."

Third, one defendant urges that the provision requiring the payment of attorney's fees is invalid, because it places upon those who under the terms of the statute owe and do not pay demurrage, a penalty not imposed upon debtors generally. Thus the carrier is denied the actual protection of the law and suffers a taking of property without due process of law. We are referred to R. R. Co. v. Ellis, 17 S. C. R. 255. That case involved the constitutionality of a law requiring carriers to pay attorney's fees on their failure to pay claims for less than $50 for labor, damages, over charges on
59 freight or for the killing of stock. It was held that this was a statute which compelled the payment of indebtedness but which did not come within the scope of the police power. Three justices dissented. In the case at bar, however, the law was enacted in the exercise of police power. The case cited and the class of

authorities to which it belongs have no relevancy to the issues here presented. That this demurrage charge has been fixed in part at a definite sum of one dollar a day for each car and in part in an uncertain sum to be determined by the reasonable value of the services actually rendered in each case to be taxed and paid as costs, is no valid objection to this part of the law. If this particular provision, however, were void it would not affect the substance of the statute.

Affirmed.

JAGGARD, *J.*

60 State of Minnesota, Supreme Court.

16362.

THE HARDWICK FARMERS ELEVATOR COMPANY, Respondent,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellant.

*Petition for Writ of Error and Order Allowing Writ and Fixing Bond.*

Filed Feb. 16, 1910. I. A. Caswell, Clerk.

61 State of Minnesota, in Supreme Court.

THE HARDWICK FARMERS ELEVATOR COMPANY, Respondent,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellant.

*Petition for Writ of Error.*

The petition of the Chicago, Rock Island and Pacific Railway Company, defendant and appellant in the above entitled cause, respectfully shows unto Your Honors:—

This cause is an action commenced by the plaintiff and respondent above named against your petitioner, to recover penalties because of the failure of your petitioner to furnish cars to plaintiff for the movement of interstate consignments, within seventy-two hours after demand made therefor. This action is based upon, and can only be maintained in its present form under and pursuant, the provisions of chapter 23 of the General Laws of the State of Minnesota for the year 1907. Suit was commenced in the district court of Rock County in the State of Minnesota, and, in due time and pursuant to the provisions of the code of said state, your petitioner answered the amended complaint in said cause and claimed that the provisions of said chapter 23 of the General Laws of Minnesota for the year 1907 do not apply and cannot relate to the failure of defendant to move interstate consignments; that said statute
62 could not lawfully regulate, nor could it control, interstate commerce; that the provisions of said statute were void and in

violation of the exclusive powers granted to the Congress by the Constitution of the United States, and the enforcement of said statute would deprive the defendant of its property without due process of law and would deny the defendant the equal protection of the law, in violation of the Constitution of the United States.

And, in this behalf, your petitioner doth further aver that, upon the trial of said cause it duly moved the court to dismiss said action, and afterward moved the court to direct the jury to return a verdict for the defendant, for the reasons, namely:

(*a*) That said act of Minnesota, 1907, chapter 23, so far as may concern the movement *od* interstate commerce, is invalid and in violation of the laws of The Congress and of the Constitution of the United States, especially the so-called commerce clause, in section 8, article I of the United States Constitution; and,

(*b*) Because, so far as may concern the movement of interstate commerce, said act, if enforced, would deprive your petitioner of its property without due process of law, and would deny it the equal protection of the law, in violation of section 1, article XIV, of the Constitution of the United States.

Said District Court, upon the trial of the issues in said cause, decided and gave judgment against the aforesaid claims of your petitioner, in the sum of $302.36, and, upon an appeal to the Supreme Court of the State of Minnesota, and in said Court, your petitioner renewed its claim as to the unconstitutionality and invalidity of said chapter 23 of the Laws of Minnesota 1907, as herein set forth. The Supreme Court of Minnesota, upon the trial of said appeal, affirmed
63 the order and the judgment of the said District Court, and thereby decided and rendered its judgment against your petitioner, and against the rights and claims made as aforesaid by it in said Supreme Court, and, on the 8th day of February, 1910, said Supreme Court of the State of Minnesota, rendered a final judgment in said cause affirming the judgment of said District Court for said damages and penalty.

Said Supreme Court of the State of Minnesota was, and is, the tribunal having jurisdiction, under the laws of the State of Minnesota, to render final judgment in all proceedings and actions of the character here set forth and said judgment is the final judgment and decision in said cause, in favor of the plaintiff and against your petitioner herein. Said final judgment of the Supreme Court of the State of Minnesota was against each and all the rights so claimed by your petitioner in said matter, all of which will more fully appear by the record in said proceedings, now remaining in said Supreme Court.

Wherefor-, for as much as your petitioner believes that there was manifest error in said decision of said Court against the several claims of your petitioner, as hereinbefore set forth, and in the final judgment in said action or proceeding, which is to the great damage of your petitioner, your petitioner prays that Your Honors will examine the records of said Supreme Court of the State of Minnesota in this behalf, and allow your petitioner a writ of error to the end that said judgment and record may be brought before the Supreme

Court of the United States agreeably to the laws of the United States in that behalf duly enacted.

Dated February 14th, 1910.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
*Petitioner, and*
STRINGER & SEYMOUR &
A. J. DALEY,
*Attorneys for Petitioner.*

64 STATE OF ILLINOIS,
*County of Cook, ss:*

F. O. Melcher, being first duly sworn, doth depose and say that he is the Second Vice President of the Chicago, Rock Island and Pacific Railway Company, the petitioner named in the foregoing petition. He has read said petition and knows the contents thereof, and said petition is true of his own knowledge.

F. O. MELCHER.

Subscribed and sworn to before me, this 14th day of February, 1910.

C. NEYQUIST,
*Notary Public, Cook County, Illinois.*

My commission expires Aug. 5, 1911.

65 State of Minnesota, in Supreme Court.

THE HARDWICK FARMERS ELEVATOR COMPANY, Respondent,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellant.

*Order.*

Upon reading the foregoing petition, and upon said petition and the records in this case submitted therewith, it is hereby

Ordered that, the writ of error in said petition prayed for be, and the same is hereby allowed; provided, however, that said petitioner shall give bond according to law in the sum of one thousand dollars, which bond shall operate as a supersedeas bond.

Dated February 16, 1910.

CHAS. M. START,
*Chief Justice of the Supreme Court of the State of Minnesota.*

66 State of Minnesota, Supreme Court.

16362.

THE HARDWICK ELEVATOR COMPANY
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

*Assignment of Errors.*

Filed Feb. 8, 1910. I. A. Caswell, Clerk.

67 State of Minnesota, Supreme Court, October Term, 1909.

THE HARDWICK FARMERS ELEVATOR COMPANY, Plaintiff and Respondent,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant and Appellant.

*Assignment of Errors.*

Now comes the appellant in the above entitled cause and shows and avers that, in the records and proceedings in said cause, the District Court of the County of Rock in the State of Minnesota, erred to the grevious injury and wrong of appellant herein, and to the prejudice and against the rights of appellant herein in manner and form as follows:

1. The Court erred in denying appellant's motion to dismiss the action at the conclusion of respondent's testimony.

2. The Court erred in refusing to charge the jury to return a verdict for defendant upon the ground that chapter 23 of the act of 1907 does not and cannot apply to shipments or consignments alleged to have been offered by respondent to appellant herein, and that said statute, so far as may concern such proffered shipments or consignments, is invalid and ineffectual, being an obstruction to and an attempted regulation of interstate commerce in violation of section 8, article I, of the United States Constitution, and the laws of the Congress of the United States.

3. The Court erred in refusing to direct the jury to return a verdict for appellant on the ground that the act of 1907, by virtue of the provisions of which this suit is brought, is invalid and
68 ineffectual so far as may concern interstate shipments and consignments offered the appellant in this case, and is in violation of the act of the Congress of the United States and of the Constitution of the United States, and especially section 1, article XIV, and because said act, if enforced, would deprive this appellant of its property without due process of law, and would deny to this appellant the equal protection of the laws.

4. The Court erred in holding that the act of 1907, chapter 23,

commonly known as the Reciprocal Demurrage Law of Minnesota, does apply to interstate shipments or consignments offered to common carriers or received by them, and that said law is valid and effectual and not in violation of the laws of the Congress and of the Constitution of the United States, especially the so-called "commerce clause," known as section 8, article I, of the United States Constitution.

5. The Court erred in holding that said chapter 23 of said act of 1907 does apply to interstate shipments and interstate commerce, and that said chapter is not in violation of section 1, article XIV, of the United States Constitution, and that the act, if enforced, would not deprive the appellant of its property without due process of law and would not deny to appellant the equal protection of the laws.

6. The Court erred in refusing to grant a new trial for the reasons set forth in the notice of the motion.

7. The verdict is not justified by the evidence.

8. The verdict is contrary to law.

Dated September 1, 1909.

STRINGER & SEYMOUR AND
A. J. DALY,
*Attorneys for Appellant.*

69 In the Supreme Court of the United States.

16362.

THE C., R. I. & P. RY. CO., Plaintiff in Error,
vs.
THE HARDWICK FARMERS ELEV. CO., Defendant in Error.

*Assignment of Errors.*

Filed Feb. 21, 1910. I. A. Caswell, Clerk.

70 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE HARDWICK FARMERS ELEVATOR COMPANY, Defendant in Error.

*Assignment of Errors.*

Comes now the plaintiff in error in the above entitled cause and respectfully avers and shows that in the records and proceedings in said cause, the Supreme Court of the State of Minnesota erred to the grievous injury and wrong of plaintiff in error herein, and to the prejudice and against the rights of plaintiff in error, in manner and form as follows, to-wit:

1. The said Supreme Court erred in holding that the act of Minnesota 1907, chapter 23, does apply to interstate shipments or consignments offered to common carriers or received by them, and that said law is valid and effectual and not in violation of the laws of the Congress and of the Constitution of the United States, especially the so-called commerce clause known as section 8, article I, of the United States Constitution.

2. The said Supreme Court erred in holding that said chapter 23 of said act of 1907 does apply to interstate shipments and interstate commerce, and that said chapter is not in violation of section 1, article XIV, of the Constitution of the United States, and that the act if enforced in such cause would not deprive this appellant of its property without due process of law and would not deny to appellant the equal protection of the laws.

71 3. The said Supreme Court erred in sustaining the District Court of Rock County, Minnesota, in its refusal to dismiss the action for the reasons specifically set forth in the first and second assignments of error herein—the invalidity of said statute having been respectfully urged for the reasons hereinbefore set forth.

4. The said Supreme Court erred in sustaining the District Court in its refusal to make the following charges to the jury:

(*a*) The jury is instructed to return a verdict for the defendant.

(*b*) The act of 1907, chapter 23, commonly known as the Reciprocal Demurrage Law of Minnesota, does not apply to interstate shipments or consignments offered to or received by common carriers and so far as may concern interstate commerce is invalid and ineffectual and in violation of the laws of Congress and of the Constitution of the United States, especially the so-called commerce clause, in section 8, article 1, of the United States Constitution.

(*c*) Said chapter 23, of the act of 1907, commonly known as the Reciprocal Demurrage Law of Minnesota, does not apply to the shipments or consignments alleged to have been offered by the plaintiff to the defendant herein, and said statute so far as may concern such proffered shipments or consignments, is invalid and ineffectual, being an obstruction and an attempted regulation of interstate commerce in violation of section 8, article 1, of the United States Constitution and of the laws of Congress of the United States.

(*d*) The act of 1907, by virtue of the provisions of which
72 this suit is brought, is invalid and ineffectual so far as may concern the interstate shipments and consignments offered the defendant in this case, and is in violation of the laws of the Congress and of the United States Constitution, and especially section 1, article 14, and because said act, if enforced, would deprive this defendant of its property without due process of law, and would deny the defendant the equal protection of the laws.

5. The said Supreme Court erred in not reversing the judgment of the trial court and in not giving to plaintiff in error its rights under the Constitution of the United States, as claimed and set forth in the record in said cause.

Wherefore, for these and other manifest errors appearing in the record, the said Chicago, Rock Island and Pacific Railway Company,

plaintiff in error, prays that judgment of said Supreme Court of the State of Minnesota be reversed and set aside, and held for naught, and that judgment be rendered for plaintiff in error granting unto it its rights under the Constitution of the United States. And plaintiff in error also prays judgment for its costs and disbursements in that behalf unlawfully sustained.

EDWARD C. STRINGER,
McNEIL V. SEYMOUR,
306 *National German American Bank Building, Saint Paul, Minnesota,*
*Attorneys for Plaintiff in Error.*

73 16362.

In the Supreme Court of the United States.

C., R. I. & P. Ry. Co., Plaintiff in Error,
vs.
THE HARDWICK FARMERS ELEVATOR COMPANY.

*Supersedeas Bond.*

Filed Feb. 18, 1910. I. A. Caswell, Clerk.

74 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THE HARDWICK FARMERS ELEVATOR COMPANY, Defendant in Error.

*Bond.*

Know all men by these presents that The Chicago, Rock Island and Pacific Railway Company, a consolidated corporation created, organized and existing under and by virtue of the laws of the states of Illinois and Iowa, as principal, and Henry Vonder Wyer and Desire H. Michaud as sureties, are held and firmly bound unto The Hardwick Farmers Elevator Company in the sum of one thousand dollars, to be paid to the said Hardwick Farmers Elevator Company, for which payment well and truly to be made, we bind ourselves, our successors, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 14th day of February, in the year of our Lord one thousand nine hundred and ten.

Whereas, the above named Chicago, Rock Island and Pacific Railway Company seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Minnesota,

Now therefore, the condition of this obligation is such that, if

the above named plaintiff in error shall prosecute its writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation shall
75 be void; otherwise, to remain in full force and virtue.

In witness whereof, the said Chicago, Rock Island and Pacific Railway Company has caused these presents to be executed by its 2nd Vice-President in that behalf duly authorized, and its corporate seal to be hereunto affixed, and the sureties have hereunto set their hands and seals, this 14th day of February, 1910.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO.,
By F. O. MELCHER, *Its 2nd Vice-President.*

Attest:

[CORPORATE SEAL C., R. I. & P. RY.]

C. F. JILSON, *Ass't Secretary.*
H. VON DER WYER. [SEAL.]
DESIRE H. MICHAUD. [SEAL.]

Signed, sealed and delivered in the presence of—

JOHN C. SCOTT,
RAY SULLIVAN,
As to C., R. I. & P. Ry. Co.
M. McGINN,
McN. SEYMOUR,
As to Sureties.

STATE OF ILLINOIS,
*County of Cook, ss:*

On this 14th day of February, 1910, before me appeared F. O. Melcher to me personally known, who being by me duly sworn, did say that he is the 2nd Vice-President of the Chicago, Rock Island and Pacific Railway Company, and that the seal affixed to the said instrument is the corporate seal of said corporation and said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said F. O. Melcher acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] C. NYQUIST,
*Notary Public, Cook County, Illinois.*

My commission expires Aug. 5, 1911.

76 STATE OF MINNESOTA,
*County of Ramsey, ss:*

On this 16th day of February, 1910, before me personally appeared Henry Vonder Wyer and Desire H. Michaud to me known to be the persons described in and who executed the foregoing in-

strument, and acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] M. McGINN,
*Notary Public, Ramsey County, Minnesota.*

My commission expires Jan. 11, 1914.

STATE OF MINNESOTA,
*County of Ramsey, ss:*

Henry Von der Wyer and Desire H. Michaud being severally sworn, each for himself, deposes and says that he is a resident and freeholder in the county of Ramsey and state of Minnesota, and is worth the sum of one thousand dollars over and above all his debts and liabilities, and exclusive of property exempt from execution, attachment or garnishment.

H. VON DER WYER,
DESIRE H. MICHAUD.

Subscribed and sworn to before me this 16th day of February, 1910.

[NOTARIAL SEAL.] M. McGINN,
*Notary Public, Ramsey County, Minnesota.*

My commission expires Jan. 11, 1914.

I hereby approve the above and foregoing bond, both as to form and sureties, this 16 day of February, 1910.

CHAS. M. START,
*Chief Justice of the Supreme Court of the State of Minnesota.*

77 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THE HARDWICK FARMERS ELEVATOR COMPANY, Defendant in Error.

*Citation.*

The United States of America to the Hardwick Farmers Elevator Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the state of Minnesota, wherein the Chicago, Rock Island and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said

plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota, this 16th day of February, 1910.

CHAS. M. START,
*Chief Justice of the Supreme Court*
*of the State of Minnesota.*

Due and personal service of the within citation admitted this 17th day of February, 1910.

C. H. CHRISTOPHERSON,
*Attorney for Hardwick Farmers Elevator Co.,*
*Defendant in Error, Luverne, Minnesota.*

78 [Endorsed:] Original. 16362. U. S. Supreme Court. Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error, vs. The Hardwick Farmers Elevator Co., Defendant in Error. Citation. Filed Feb. 18, 1910. I. A. Caswell, Clerk.

79 In the Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

THE HARDWICK FARMERS ELEVATOR COMPANY, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judes of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Hardwick Farmers Elevator Company, respondent and defendant in error, and The Chicago, Rock Island and Pacific Railway Company, appellant and plaintiff in error, wherein was drawn into question the validity of a statute of and an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right, title, privilege, and exemption specially set up and claimed under such clause of the said Constitution, a manifest error hath happened, to the great damage of the said Chicago, Rock Island and Pacific Railway Company, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and

speedy justice done to the parties aforesaid in this behalf, do
80 command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 18th day of March next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 16th day of February A. D. 1910.

[Seal U. S. Circuit Court, Third Division, Dist. of Minnesota.]

HENRY A. LANG,
*Clerk of the United States Circuit Court*
*for the District of Minnesota.*

Allowed by
CHAS. M. START,
*Chief Justice of the Supreme Court*
*of the State of Minnesota.*

81 [Endorsed:] 16362. U. S. Supreme Court. The Chicago, Rock Island & Pac. Ry. Co., plaintiff in error, vs. The Hardwick Farmers Elev. Co., Defendant in Error. Writ of Error. Filed Feb. 18, 1910. I. A. Caswell, Clerk.

Endorsed on cover: File No. 22,084. Minnesota, Supreme Court. Term No. 242. The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, vs. The Hardwick Farmers Elevator Company. Filed March 31st, 1910. File No. 22,084.

# SUPREME COURT OF THE UNITED STATES,

No. 225. OCTOBER TERM, 1911.

Office Supreme Court, U. S.
FILED.
FEB 26 1912
JAMES H. McKENNEY,
Clerk

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

HARDWICK FARMERS ELEVATOR COMPANY, *Defendant in Error.*

## BRIEF OF PLAINTIFF IN ERROR.

EDWARD C. STRINGER,
McNEIL V. SEYMOUR,
EDWARD S. STRINGER,
*Counsel for Plaintiff in Error.*

# SUPREME COURT OF THE UNITED STATES.

October Term, 1911.

No. 242.

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CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

HARDWICK FARMERS ELEVATOR COMPANY,

Defendant in Error.

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## BRIEF OF PLAINTIFF IN ERROR.

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### STATEMENT OF CASE.

The purpose of the writ of error in this case is to review the decision of the Supreme Court of Minnesota affirming a judgment of the District Court of Rock County, Minnesota, in favor of the defendant in error and against the railway company. The action was brought under and by virtue of chapter 23 of the General Laws of Minnesota for the year 1907, to recover the statutory penalties for the failure of the railway company to furnish defendant in error cars in the months of September and October, 1907, for interstate movement of grain from Hardwick, Rock County, Min-

nesota. The defendant in error was adjudged to be entitled to recover the statutory penalty of one dollar per day per car for each day's default in furnishing the cars as prescribed by the terms of the so-called "reciprocal demurrage law" of the state of Minnesota. A verbatim copy of the Minnesota statute concerned in this suit is appended to this brief. The defense interposed by the railway company was twofold:

1. That the demand for cars related to an interstate movement and in consequence thereof the penalties prescribed by this law do not apply, because this would amount to a regulation of interstate commerce and a burden upon it, in violation of the exclusive powers granted to the Congress of the United States by the constitution and would violate the laws of the Congress in that behalf duly enacted; and that the statute if enforced and applied to the consignments referred to in the complaint would deprive the railway company of its property without due process of law, and would deny to it the equal protection of the law in violation of the Constitution of the United States.

2. That, because of a freight congestion unequalled in the history of commerce, it was impossible to sooner furnish the cars, and that they were in fact furnished as soon as the difficulties of the situation would permit; and the defendant in error during this unprecedented car shortage received its full and proper proportion of the available supply of cars, and that it was treated as any other patron without favor and without discrimination and given the best possible service of which the difficulties of the situation would admit.

The trial court charged the jury that all of the consignments of grain referred to in the complaint were interstate commerce, but declined to hold that the statute referred to, imposing a penalty of one dollar per day for failure to furnish cars to be used in the movement of interstate commerce, was invalid as applied to such interstate consignments. The court submitted to the jury the question whether or not it was within the power of the railway company to have furnished cars when demanded, and the jury found a verdict for the defendant in error. The Supreme Court of Minnesota, January 28, 1910, filed an opinion affirming the judgment of the District Court of Rock County entered upon the verdict of the jury. This opinion may be found upon page 26 of the Transcript of Record. The case was regularly reported in Minnesota Supreme Court Reports: *Hardwick Farmers Elevator Company vs. Chicago, Rock Island & Pacific Railway Company*, 110 Minn., 25. The judgment of affirmance was entered in the Supreme Court of Minnesota on the 8th day of February, 1910. The plaintiff in error then secured a writ of error to the Supreme Court of Minnesota for the purpose of reviewing the judgment of the state court because its decision upon the constitutionality of the statute referred to involved a construction of the federal constitution and its limitation upon the power of the state legislature.

## THE SPECIFICATION OF ERRORS.

1. The said Supreme Court erred in holding that the act of Minnesota 1907, chapter 23, does apply to interstate shipments or consignments offered to common carriers or received by them, and that said law is valid

and effectual and not in violation of the laws of the Congress and of the Constitution of the United States, especially the so-called commerce clause known as section 8, article 1, of the United States Constitution (and the district court of Rock County also erred in so holding).

2. The said Supreme Court erred in holding that said chapter 23 of said act of 1907 does apply to interstate shipments and interstate commerce, and that said chapter is not in violation of section 1, article XIV of the Constitution of the United States, and that the act if enforced in such cause would not deprive this appellant of its property without due process of law and would not deny to appellant the equal protection of the laws (and the district court of Rock County also erred in so holding).

3. The said Supreme Court erred in sustaining the District Court of Rock County, Minnesota, in its refusal to dismiss the action for the reasons specifically set forth in the first and second specification of error herein—the invalidity of said statute having been urged for the reasons hereinbefore set forth (and the district court of Rock County erred in its refusal to dismiss said action for the aforesaid reasons).

4. The said Supreme Court erred in sustaining the District Court in its refusal to make the following charges to the jury (and the district court of Rock County erred in its refusal to make said charges to the jury):

(a) The jury is instructed to return a verdict for the defendant.

(b) The act of 1907, chapter 23, commonly known as the Reciprocal Demurrage Law of Minnesota, does not apply to interstate shipments or consignments offered to or received by common carriers and so far as may concern interstate commerce is invalid and ineffectual and in violation of the laws of the Congress and of the Constitution of the United States, especially the so-called commerce clause, in section 8, article 1, of the United States Constitution.

(c) Said chapter 23, of the act of 1907, commonly known as the Reciprocal Demurrage Law of Minnesota, does not apply to the shipments or consignments alleged to have been offered by the plaintiff to the defendant herein, and said statute, so far as may concern such proffered shipments or consignments, is invalid and ineffectual, being an obstruction to and an attempted regulation of interstate commerce in violation of section 8, article 1, of the United States Constitution and of the laws of the Congress of the United States.

(d) The act of 1907, by virtue of the provisions of which this suit is brought, is invalid and ineffectual so far as may concern the interstate shipments and consignments offered the defendant in this case, and is in violation of the laws of the Congress and of the United States Constitution, and especially section 1, article 14, and because said act, if enforced, would deprive this defendant of its property without due process of law, and would deny the defendant the equal protection of the laws.

5. The said Supreme Court erred in not reversing the judgment of the trial court and in not giving to plain-

tiff in error its rights under the Constitution of the United States, as claimed and set forth in the record in said cause.

## QUESTIONS INVOLVED IN THIS CONTROVERSY.

1. May chapter 23 of the Laws of Minnesota for the year 1907 be applied to interstate shipments?

2. Is the statute in violation of the laws of the Congress and of the Constitution of the United States, especially the so-called "commerce clause" known as section 8, article I, of the United States Constitution?

3. Is said chapter 23 of said act of 1907 in violation of section 1, article 14, of the Constitution of the United States, and will this act if enforced deprive a common carrier of interstate commerce of its property without due process of law, and will its enforcement deny to the carrier the equal protection of the laws?

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## ARGUMENT.

### I.

Will the Court kindly note the form and structure of this act? By section 1 of this law, the railway company is required to furnish the cars demanded within a reasonable time after the application, not to exceed 48 hours, at terminal points, and 72 hours at intermediate points, Sundays and legal holidays excepted. These cars shall be supplied in the order in which applications are made therefor, without giving preference to

any person. The concluding portion of section 1 is as follows:

> "When cars are applied for under the provisions of this chapter, if they are not furnished within the time herein stated, the railroad company so failing to furnish them shall forfeit to the party or parties so applying for them, the sum of one dollar per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, *together with all damages such applicant may have sustained.*"

That this is a penalty pure and simple is indicated by the act itself.

> "Sec. 10. The payment by said railroad company of demurrage provided in this act, shall in no way invalidate or offset any claim any shipper or consignee may have or make for damages occasioned by delay on the part of such railroad company, or other cause, *but shall be a further remedy and in addition to any already existing.* Nor shall anything herein contained be held to lessen the duties of any common carrier in the shipment of live stock or other perishable property."

Section 13 also provides that plaintiff may recover an attorney's fee for commencement and prosecution of suit.

Apparently it is not necessary to bring a separate suit for the damages sustained, but claim for all damages sustained may be added to the penalty and may be enforced in the same suit. The concluding words of section 1 seem to plainly indicate this.

It will be observed, therefore, that the shipper may recover every penny of damage that he has sustained and

then penalize the carrier for failure to supply cars. Not only is a penalty imposed, but the shipper by the terms of the act may claim the right of indemnification on account of attorneys' fees incurred in suit which he may bring to recover such penalty. Indeed, as we understand the situation in this case, in a rising market the shipper may by reason of the advancement in price of his commodity in the markets of the world, secure a positive advantage by reason of delay in furnishing cars. Nevertheless, he may penalize the railway company for its failure to furnish the cars as required by statute.

## II.

ALL OF THE CONSIGNMENTS CONCERNED IN THIS SUIT ARE INTERSTATE SHIPMENTS NOTWITHSTANDING THE FACT THAT IN SOME CASES PLACE OF ORIGIN AND THAT OF DESTINATION ARE MINNESOTA.

This is decided as the law of this case by the Supreme Court of Minnesota and is a part of the decision. It is admitted in the answer, and no one we understand disputes the correctness of this rule, which is now firmly established by state and federal decisions:

*State ex. rel. Railroad and Warehouse Commission vs. C. St. P. M. & O. Ry. Co.*, 40 Minn., 267:

> "The Railroad and Warehouse Commission of this State has no authority to prescribe rates for the transportation by common carrier in another State. It cannot fix the rates for carriage between two points within this state over a route extending across a neighboring state. Such power is vested exclusively in Congress."

This case involved a shipment from Duluth, Minnesota, to the city of Mankato, Minnesota. It will be recalled that the Omaha Railway enters the state of Wisconsin at Superior, and the state of Minnesota near Hudson, Wisconsin. In the movement of freight between Hardwick, Minnesota, and Minneapolis, Minnesota, more than one-third of the mileage is in the state of Iowa.

The leading case in the United States Supreme Court is

*Hanley v. Kansas City Southern Ry. Co.*, 187 U. S., 617; same case, 23 S. C. R., 214.

## III.

HISTORY OF THE ACT AND THE PRACTICAL CONSTRUCTION PLACED UPON THE SO-CALLED RECIPROCAL DEMURRAGE LAW BY THE STATE AUTHORITIES AND THE INTERSTATE COMMERCE COMMISSION.

At the time when this so-called "reciprocal demurrage law" was adopted, the gravest doubt was expressed in the debates with respect to the validity of this measure, so far as it may concern interstate commerce. A considerable number of the lawmakers doubted whether the law was valid even as applied to commerce between points in the state, because it referred alike by its terms to both interstate and intrastate commerce. A measure by the same author, substantially along the lines of the act of 1907, was considered by the Minnesota legislature in 1905, and a committee of the senate, to whom this measure was referred, after exhaustive research and extended consideration, made an unfavorable report which

was adopted. The measure was, however, again introduced in 1907 and was carried. Defendant in error on pages 6 and 7 of its brief in the Supreme Court of Minnesota cited an opinion of the attorney general given April 12, 1905, when the counterpart of this measure was before the senate. This opinion will probably be cited in the argument before this Honorable Court.

"April 12th, 1905.

"Hon. A. B. Cole,
State Senate.

Dear Senator: Answering your inquiry of yesterday in relation to the so-called reciprocal demurrage bill now under consideration in the Senate, I am of the opinion that the passage of such a bill is clearly within the power of the legislature, and that the same would be valid and enforceable, if passed, provided its terms are reasonable. I do not see how a law of this kind could be called a regulation of interstate commerce any more than the imposition of switching charges would be such a regulation, and in the case of C. M. & St. P. Ry. v. Becker, et al., 32 Fed. Rep. 849, the federal court held such a state regulation was not an interference with interstate commerce.

I have given no attention to the reasonableness of the bill and on that subject express no opinion.

Yours truly,

E. T. YOUNG,
Attorney General."

This is true. Such an opinion was expressed by Attorney General Young. But this was the expression of opinion at first impression, given in the haste due to press of business of an active session of the legislature.

Two years afterward, when the attorney general, undisturbed by the demands of a legislative session, had opportunity to give this matter the careful thought and reflection which its importance deserved, he expressed his view in a letter (doubtless not called to the attention of counsel for defendant in error) as follows:

"October 30th, 1907.

"Mr. E. B. Swygart,
101 Drake Block,
St. Paul, Minnesota.

Dear Sir: I have for acknowledgment your favor of the 18th inst., enclosing a copy of a letter written by the Wisconsin Northern Grain Company.

In answer thereto I would say that it is the opinion of this office that the Reciprocal Demurrage Law passed by the last session of the Minnesota Legislature, does not apply to cars ordered by shippers for shipments to points without the State of Minnesota. The only remedy I can suggest is that you take the matter up with the Interstate Commerce Commission at Washington, they having jurisdiction over interstate matters.

Very truly,
E. T. YOUNG,
Attorney General."

On April 9, 1908, Attorney General Young expressed the further opinion that he had some doubt as to the validity of the measure as a whole, because by its terms it applied alike to the movement of interstate commerce and commerce between points in the state. The opinion of October 30, 1907, has been generally accepted as the law of Minnesota not only by the state authorities, but every Minnesota shipper so far as we know, except this defendant in error.

This suit was commenced July 11, 1908. The statute was approved April 17, 1907. The Interstate Commerce Commission, before commencement of this suit, had directed railway companies to disregard all laws of this character as applied to interstate commerce. To the practical construction placed upon the broad and comprehensive language of the Interstate Commerce Act may we now refer the Court?

> "DEMURRAGE ON INTERSTATE SHIPMENT (adopted May 12, 1908). The Act requires that carriers shall publish, post and file 'all terminal charges * * * which in any wise change, affect or determine * * * the value of the service rendered to the passenger, shipper or consignee,' and all such charges become a part of the 'rates, fares and charges' which the carriers are required to demand, collect and retain. Such terminal charges include demurrage charges.
>
> (a) On March 16, 1908, the Commission decided that demurrage rules and charges applicable to interstate shipments are governed by the Act to regulate commerce, and therefore are within its jurisdiction and not within the jurisdiction of state authorities. Any other view would open a wide door for the use of such rules and charges to effect the discriminations which the act prohibits.
>
> Demurrage rules and charges as published and filed must be observed as strictly as transportation rules and charges."
>
> Tariff Circular No. 18 A page 108 revised by order of Commission Feb. 13, 1911; effective March 31, 1911.

Commissioner Lane in the matter of car shortage and other insufficient facilities, makes the following observa-

tion with respect to state laws concerning reciprocal demurrage:

> "Manifestly it is of little value to a shipper to be given a car if that car, when loaded, is not moved promptly to destination. Therefore, the conclusion is inevitable that reciprocal demurrage alone will not insure better railroad service when the movement is over more than one system of railroad. Such a law or rule must be supplemented by some other rule or law under which the originating carrier may be insured of prompt return of the cars which it delivers to its connections.
>
> The traffic of this country cannot be moved in the fashion which obtained in the early days of railroading, when transfers were universal at junction points. When the railroad is penalized for not placing a car at a shipper's warehouse or elevator, it will protect itself against the loss of that car by refusal to permit it to pass beyond its control unless it can be given another car in its stead, or unless some system is devised similar to that of the car pool under which its needs for cars may be promptly met.
>
> It will profit those who are seeking to remedy the shortage in car service by means of the imposition of reciprocal demurrage to consider well the decisions of the United States Supreme Court in Houston & Texas Central Railroad Company vs. Mayes, 201 U. S. 321. This case involved the applicability of the Texas law to interstate commerce."

Further evidence of the practical construction of this law is shown by reference to the proceedings of the National Association of Railway Commissioners at its 21st Annual Convention. The publication is made by the Government. We think that the Railroad Commission of every state was represented at the meeting. In the discussion of car service and demurrage (see page 277) one of the Minnesota Commissioners gave expres-

sion to the practical interpretation which has been placed upon this Minnesota law:

> "More than that, I want to say that while that law" (the Commissioner calls it the reciprocal demurrage law) "has existed upon our statute books for three years, nobody has ever heard of a railway company in the State of Minnesota paying one cent to any shipper in the shape of demurrage. It seems to me that this demurrage question is, as I say, a selfish question and, in the interest of the small shipper, I feel obliged to oppose this amendment."
>
> A commissioner—"I would like to ask a question: Does the law in your state apply at all to interstate shipments?"
>
> Commissioner (answering): "No, it does not; and I want to say now *that no law applies to interstate shipments on the question of demurrage.* This simply means that while railroad companies would not be obliged in any sense to adopt the proposed demurrage laws, they might be induced to adopt them, and have them applied to the traffic which is interstate."

The last word upon the subject of so-called reciprocal demurrage, expressed in the National Association of Railway Commissioners' convention proceedings of the Twenty-third Annual Convention, held at Washington, D. C., October 10, 1911, is found on pages 184 and 185 of the printed record:

> "Commissioner of South Dakota: (In South Dakota there is a so-called reciprocal demurrage law) I believe we are up against, as I understand from the lawyers, a decision of the courts that interstate shipments are under the control of the Interstate Commerce Commission."

At the top of page 185:

> "The President of the Convention: You do not

> understand that state commissions can fix reciprocal demurrage on an interstate shipment, do you? South Dakota Commissioner: No, I do not."

It is only fair to state, however, that the commissioner from Arkansas, in referring to the decisions of the courts of his state, expressed the thought that there was at least the authority of those decisions in favor of application of reciprocal demurrage laws to interstate commerce. (We think the citations made from Arkansas decisions will show that this is not the case.)

It will not, of course, be understood that the construction of the convention that a state law of this character cannot be applied to the movement of interstate commerce, should be cited as an authority in this case. The office of the citation is but to show the practical interpretation placed upon laws of this character, and upon this particular law. No more is claimed of it than this.

The case of Wilson Produce Company vs. Pennsylvania R. R. Co., 14 I. C. C. Reports, 170, decided June 24, 1908, illustrates the practical interpretation placed upon a state statute substantially of this character. The attitude of the Interstate Commerce Commission with respect of state rules, regulations or charges sought to be applied to interstate shipments, has been consistent and uniform. In this case, the Commission had before it a statute of the state of Pennsylvania entitled,

> "An act to provide the maximum car service charges, including car storage charges, that railroad companies and corporations or associations, may charge and collect on each carload not unloaded within the free time for unloading cars, and fixing

the free time that shall be allowed for unloading cars."

With respect of this statute, the Commission in its well-considered opinion, says (Commissioner Lane speaking for the Commission):

> "The first question to be determined is the authority of the Pennsylvania statute of May 24, 1907, fixing the charges which a railroad may impose for demurrage or storage in its cars. Track storage charges, when associated with an interstate movement, appertain directly to interstate commerce. They represent the carrier's compensation for services rendered in connection with the transportation. A shipment is not complete until arrival at destination and delivery to the consignee; and the authority vested in Congress by the commerce clause of the Constitution covers everything related to the delivery of freight, transportation between the states.
>
> Rhodes vs. Iowa, 170 U. S., 412, 426.
>
> Bowman vs. Chicago & Northwestern, 125 U. S., 465.
>
> McNeil vs. Southern Railway Co., 202 U. S., 543, 559.
>
> In the case of Interstate Commerce Commission vs. Detroit, Grand Haven & Milwaukee Ry Co., 167 U. S., 633, the Supreme Court suggested that the Commission would be acting within its powers, if it should order that railway companies should regard cartage, when furnished free, as a terminal charge and include it in their schedules. If cartage charges may be regarded as a proper subject for national regulation, federal authority over demurrage and track storage charges in connection with interstate commerce cannot be challenged. We think we may go further and hold that federal authority in this field is exclusive * * *.

The question of terminal charges imposed in connection with interstate transportation would seem to be within the scope of this principle. The subject is national in character and uniformity of regulation is essential. If the individual states were permitted to legislate in this field, endless confusion and discrimination would be the result. Such legislation would operate as a direct burden upon interstate commerce and the supreme court has repeatedly refused to sustain state laws which had this effect.

Wabash St. L. & Pac. Ry. Co. vs. Illinois, 118 U. S., 557.

Rhodes vs. Iowa, 170 U. S. 412.

Bowman vs. Chicago & Northwestern Ry Co., 125 U. S., 465.

McNeil vs. Southern Ry. Co., 202 U. S., 543.

Central Georgia Ry. Co. vs. Murphy, 196 U. S., 194, 204."

The Commission then refers to the first section of the act to regulate commerce, as amended, defining transportation as including "all services in connection with the receipt, delivery, elevation, transfer in transit * * * storage and handling of property." Reference is also made to section 6, that

"Carriers' schedules shall state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require." Upon these provisions the Commission makes this comment:

"Beyond all possibility of doubt, therefore, the duty of regulating terminal charges when related to interstate transportation has been lodged with the Interstate Commerce Commission and the Federal courts have so held.

United States vs. Standard Oil Co., 148 Federal, 719, 722.

Michie vs. New York, N. H. & Hartford R. R. Co., 151 Federal, 694."

(That the courts of Pennsylvania have followed this decision will appear from citations to follow.)

## IV.

THE NATURE OF THE ACT TO REGULATE INTERSTATE COMMERCE AND THE MANIFEST PURPOSE DISCLOSED BY IT (ESPECIALLY BY THE HEPBURN AMENDMENT) TO ASSUME AND EXERCISE COMPLETE CONTROL OVER ALL TERMINAL CHARGES IN RESPECT OF INTERSTATE COMMERCE.

The Interstate Commerce Act under the title "An Act to Regulate Commerce," as amended June 29th, 1906, provides in part as follows:

"Sec. 1. The provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity * * * and to any common carrier or carriers engaged in the transportation of passengers or property * * * from one state or territory of the United States to any other state or territory * * *.

The term 'common carrier', as used in this act, shall include express companies and sleeping car companies. The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad * * * and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the per-

sons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage * * * *and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier, subject to the provisions of this act, to provide and furnish such transportation upon reasonable request therefor,* and to establish through routes and just and reasonable rates applicable thereto.

All charges made for any service rendered, or to be rendered, in the transportation of passengers or property, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful."

It will not be overlooked that the word "transportation" is given its most extended meaning. It includes not only carriage of property from one place to another, but includes the receipt of cargoes and the delivery thereof. It cannot well be doubted that every element in the service from the receipt of the car to the actual delivery, including storage of the property, is embraced. It is made the statutory duty of the carrier to provide and furnish such transportation, meaning not only carriage, but the vehicles and other instrumentalities of commerce, upon reasonable request therefor. Sections 2 and 3 are as follows:

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirect-

ly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Section 2 is intended to forbid discrimination as to persons. Section 3 as to localities. It is just as much a violation of the act to give an improper preference or advantage to any particular locality as to any person.

Section 6 provides for publication of rates, fares and charges for transportation by carrier "between points on its own lines and points on the route of any other carrier by railroad * * * when a through route and joint rate have been established." The schedules printed

> as aforesaid by any such common carrier * * * shall also state separately all terminal charges, storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee * * *. The provisions of this section shall apply to all traffic, transportation and facilities as defined by this act."

Direct reference is made to terminal and storage charges and rules and regulations which in any wise change, affect or determine any part of the rate.

Section 7 is as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act."

The legislative intent is manifest. There shall be no breaking of bulk or stoppage or interruption so as to prevent transportation of freight from being treated as one continuous carriage. The purpose of this section is to broaden and extend the movement of interstate commerce, and it implies and suggests, though it does not compel, movement of interstate commerce from point of origin to destination in the same vehicle.

Then follow several sections creating an interstate commerce commission and giving it extended jurisdiction in all matters affecting the movement of interstate commerce.

And now having defined the right of shippers, the act proceeds to define in some detail at least one of the remedies in the event of failure upon the part of the carrier to comply with the terms of the act, among the obligations of which that to provide and furnish transportation, meaning thereby cars, other vehicles and all instrumentalities and facilities of shipment or carriage, is one.

> "Sec. 23. That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs or mandamus against said common carrier, commanding such common carrier to move and transport the traffic or *to furnish cars*

> *or other facilities for transportation for the party applying for the writ*: * * * Provided, that the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

The demand for cars and their receipt for use in moving interstate commerce are specifically covered by the language of Section 1. The act in terms refers to all cars and other instrumentalities and to all services in connection with the receipt and delivery of property as a part of the carrier's duty. And it is also specifically declared to be the duty of the carrier, upon reasonable request therefor, to furnish *such transportation* (expressly declared to mean cars and other instrumentalities). How can it be said that the Congress has failed to legislate upon this subject? It is difficult to suggest or conceive how Congress could have legislated more specifically. How can it be said that the Congress has failed to provide a remedy? Section 23 of the Interstate Commerce Act not only gives a distinct remedy by application for writ of mandamus at the instance of the shipper if he fails to furnish cars or other facilities for transportation, but the Interstate Commerce Commission (see Section 12) has authority

> "to inquire into the management of the business of all common carriers, subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this

act; and upon request of the Commission, it shall be the duty of any district attorney of the United States, to whom the Commission may apply, to institute in the proper court and to prosecute under direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof."

Likewise the aggrieved party may prosecute a claim for damages against the railroad company delinquent with respect to this declared duty to furnish cars, or perhaps his remedy may be under section 13 by application to the Commission complaining of anything done or omitted to be done by the common carrier. Without deciding which remedy the claimant may have, the remedy full, complete and plenary exists in one form or the other.

The language employed by the Interstate Commerce Act, as amended, leaves no room for speculation or doubt that the statute was intended to cover every element of interstate commerce. Its control begins with the receipt of the property and extends to its carriage, transfer, handling, icing, storage and finally, with its delivery. The enactment requires the filing and publication not only of all tariffs and charges for carriage of the property, but all acts of the carrier both preliminary and subsequent thereto. A separate statement is required of all terminal charges, storage charges and any *rule or regulation* which may in any way affect, change or determine any part of the rates, fares or charges or the value of the service rendered. The underlying principle of this statute is absolute equality of charges and service without favor and without discrimination. Any device,

rule or practice by which any person, community or locality may secure a preference is condemned and forbidden. The language employed in the act, which throws around interstate commerce its protection, is in vain if a state statute may construct a policy, which by penalization, fines and forfeitures will substitute for a free and unrestricted flow of commerce a service favoring a particular locality and shippers within the confines of one state, with the consequent disadvantage to all others. A state statute, which by implication seeks to give advantage to Minnesota patrons in the movement of interstate commerce, must yield to the inexorable requirement written in every line of the act that there shall be no favoritism, no discrimination, but one purpose controlling and dominating all others—equality of charge and service alike. Yet the Court has under consideration in this case a statute plainly designed to restrict the use of equipment to a particular territory and prevent its free and uncontrolled movement from origin to destination in the usual and customary manner. There is no question of police power. The Minnesota act relates to commerce alone.

## V.

### STATE LAWS AND DECISIONS UPON SO-CALLED RECIPROCAL DEMURRAGE LAWS.

Most of the so-called reciprocal demurrage laws have been enacted by the western states. Kansas has such a law, and reference has been made to the interpretation of that law by the supreme court of that state. Oklahoma has such a law, and reference is made herein to

the conflicting decisions in respect of its interpretation. South Dakota has such a law, but we understand that there has been no judicial interpretation of the law of that state. If so, it has escaped our attention. North Dakota has a reciprocal demurrage law, but, as we read the law of that state, it relates only to intrastate business. The language is not quite clear, and we may be mistaken in our interpretation of this act. (*Chapter 153 Laws of North Dakota, 1907.*)

California has enacted a so-called reciprocal demurrage law, known as chapter 671 of the Laws of 1909, approved April 20th. This, we understand, is the history of the California statute: After extended discussion, the conclusion was reached that if by its terms the law should be made to apply to interstate shipments, it would jeopardize and perhaps invalidate the entire measure. Therefore, after consultation with the state authorities and attorney general, the act was made to conclude with the following clause:

"Section 8. This act shall apply only to shipments begun and terminated *within* the state of California."

Nebraska, in the year 1909, adopted a so-called reciprocal demurrage law, which by its terms applied to state and interstate commerce. In an opinion written April 28, 1909, to the Nebraska Railway Commission, Attorney General Thompson concludes his communication as follows:

> "From an examination of the opinions of the Supreme and Circuit Courts of the United States and the holdings of the Interstate Commerce Commission, I am led to the conclusion that the matter of demurrage charges on interstate shipments falls

> within the jurisdiction of the Interstate Commerce Commission rather than that of the State Railway Commission, even though the demurrage charges accrued within the state of Nebraska. I am led to this conclusion also from the fact that these demurrage charges are an incident to and grow out of an interstate transaction."

In Arkansas a reciprocal demurrage law is much like that of Minnesota. See Sec. 2, Act No. 193, Acts of Arkansas, 1907, bottom of page 456. This provides as follows:

> "The period during which the movement of freight is suspended on account of accident or any cause not within the *power* of the railroad company to prevent, shall be added to the free time allowed in this section and counted as free time."

Construing the Arkansas statute, the Circuit Court of the Western District of Arkansas has held this law unconstitutional because it is an interference with interstate commerce.

> *St. Louis, Iron Mountain & Southern Ry. Co. vs. Hampton*, 162 Federal, 693.

The case is instructive, because the suit had to do with intrastate shipments. The Court held that the intention of the legislature was to apply its provisions to interstate shipments as well, and that there was nothing in the act to indicate that it would have been adopted unless it could thus have been made applicable to both classes alike. This is clearly an interference with interstate commerce, the Court says, and as this provision cannot be disregarded without defeating one of the main objects of the act, it is unconstitutional.

In Arkansas there has been a recent decision in the state court upholding the statute of that state as applied to commerce between points in the state, but proceeding upon the theory that the law was invalid so far as it may concern interstate shipments. See the recent case of

> *Oliver & Son v. Railway Co.*, 117 Southwestern Rep., 238, 89 Arkansas 466.

In that case the court disposes of the argument suggested in the case at bar, namely, that the case of Houston & Texas R. R. Co. vs. Mays, 201 U. S., 321, was based upon the proposition that the law of Texas did not permit of a defense like that contained in section 11 of our statute, with respect to extension of free time on account of strikes, public calamities, accident and other causes not within the power of the railway company.

But the court answers this argument by suggesting that the real ground of the decision in the Mays case was that the law transcended the right of the state to burden interstate commerce, and the fact that the law made no provision for strikes, etc., was recited in the opinion by way of comment, *but the principle which lies at the foundation of the Mays case is interference with interstate commerce.* Quoting the exact language of the Arkansas case:

> "But the stronger reason for refusing the application of that case (Houston Ry. vs. Mays) to this lies in the fact that the Supreme Court of the United States there refused enforcement upon the ground that the requirement that cars be furnished transcended the right of the state, through its police power, to burden interstate commerce."

St. L. & S. F. R. Co. vs. Allen, 181 Fed. 710.

"Rule 44 of the Railroad Commission of the State of Arkansas which provides that "in case of failure on the part of the shipper to give routing instructions, it shall be the duty of the railroad receiving the shipment to forward it via such route as will make the lowest rate" as applied to interstate shipments is unconstitutional as an interference with interstate commerce."

E. R. Darlington Lumber Company vs. Missouri Pacific Railway Company, 216 Mo. 658; same case, 116 S. W. 530. One of the questions thought by the parties to be in this case was whether the demurrage act of Missouri applied to an interstate shipment. The court declines to decide this question.

"We shall reserve a discussion of the question as to whether or not our law is violative of the commerce clause of the Federal Constitution until it faces us in a concrete case."

In the case of C. R. I. & P. Ry. Co. vs. Beatty, reported in 118 Pac. Rep. 367, decided October 10th, 1911, the Supreme Court of Oklahoma upheld the so-called Oklahoma Reciprocal Demurrage Law. (An application for re-argument has been made, and we understand granted and this case will be reconsidered.) It seems quite at variance with the case of St. L. & S. F. R. R. Co. vs. the State of Oklahoma reported in 107 Pac. Rep. 929, decided March 8th, 1910, 26 Oklahoma 62. Quoting from the syllabus prepared by the Court:

"1. That part of order No. 167 rule 10 of the State Corporation Commission, which provides that ten days' free storage shall be allowed on less than car load shipments, when destined to consignees who

> live at interior points, five miles or more from the railroad station, in so far as it applied to interstate commerce is void for the reason that it is in conflict with and is superseded by sections 1 and 2 of an act entitled 'An act to amend an act entitled "An Act to Regulate Commerce"' (Act of June 29, 1906) and for the further reason that it interferes with and imposes upon interstate commerce an unreasonable burden."
>
> "2. It was the purpose of Congress by the Hepburn Act to assume jurisdiction over the entire subject of interstate shipments from the time of the origin of such shipments, down to the point where the shipment is entirely at an end, and its character as a transaction of interstate commerce ceases."

In the decision, the court refers to the decision of Gulf Colorado & Santa Fe Railway Company vs. Hefley, 158 U. S. 98, 15 Sup. Ct. Rep. 802.

In further support of the proposition that this order of the State Corporation Commission was invalid, the Court declares that Congress specifically covered this entire field by the Hepburn law. Section 1 is quoted at length, italics being used to show that the term "transportation" includes cars and other vehicles, and refers also to the clause requiring the railway company to furnish transportation upon reasonable request therefor. The Court, among other things, says:

> "It appears to us that it was the purpose of Congress to assume jurisdiction over the entire subject matter relative to interstate shipments from the time of the origin of such shipment down to the point where the shipment is entirely at an end and its character as a transaction of interstate commerce ceases. That such was the purpose of Congress is evidenced by the language of the act, and it is further emphasized when the conditions and

the circumstances out of which that act originated, and the evils it was intended to remedy, are recalled * * *. But if Congress may not control the storage of interstate shipments and charges therefor, occurring before delivery of the shipment, and require the establishment of uniform rates as to shippers and localities under similar circumstances and conditions, there is left to the carrier a ready means of defeating the object of the law; or where a state law does not prohibit, or where under a more liberal law in one state than in another an interstate carrier could give to its patrons, or some of them, storage facilities and rates which it refuses to others in the same state or in another state; or where no state legislation existed upon the subject, carriers could fix a low charge or no charge at all for storage in one state, and a high rate in another state, upon the same class of freight, and under similar circumstances; and if all states legislated upon the subject, it is hardly probable that there would be uniformity in legislation, and by the law of one state a shipper would be required to pay a much lower rate, and probably have a longer free time for delivery, than a shipper in an adjoining state under a law which would require a higher rate and a shorter free time for delivery of any consignment. Under such conditions, discrimination between shippers and localities could be as effectively accomplished in many instances as if the carrier were permitted to rebate on the charges for services rendered in the transit of shipment."

A comparison of the reasons assigned for the apparrently diametrically opposite conclusions reached in the two cases is interesting. A somewhat similar statute was sustained in the case of Patterson vs. Missouri Pacific Railway Company, 77 Kan. 236, 94 Pac. 138. The court decided the case substantially upon the ground that the state may make reasonable *police regulations*

affecting the operation of railroads within the state and which are also engaged in interstate commerce. The regulation should be such only as tends to the efficiency and orderly discharge of the duties of railroads to their patrons within the state, and to the safe-guarding of persons and property therein, and to impose no considerable burden upon interstate commerce. The court also gave prominence to the extent of the penalty, overlooking (it seems to us) that the Mays case did not proceed upon the extent of the penalty, but rather the nature of the law, which broadened and sought to regulate interstate commerce.

The North Carolina law penalizing railroad companies $50 for each day's refusal to receive freight brought for shipment, was upheld, but by a sharply divided Court. Two of the five judges dissented, on the ground of interference with interstate commerce.

*Reid & Rena vs. Southern Railway Company*, 150 N. C., 753; same case, 64 S. E. Rep., 874.

In Virginia, a rule was promulgated by the state corporation commission requiring railway companies to furnish cars upon four days notice. The regulation also provided that for failing to comply with this rule the company so offending should forfeit and pay to the shipper making the application for cars the sum of one dollar per car per day. By another rule, the state corporation commission is given the right at all times, whenever justice demands such action, to suspend the operation of these rules or any one or more of them in whole or in part. The Supreme Court of Virginia decided that the

rule was unreasonable and void as applied to shipments to points outside the state. See

*Atlantic Coast Line Ry. vs. Commonwealth*, 102 Va. 599; 46 S. E. Rep. 911.

*Southern Railway Co. vs. Commonwealth*, 60 S. E. R., page 70, 107 Virginia 771.

Among other things the Court says:

"For the railway company to withdraw the cars in use or needed in this state, and send them for the use of shippers in another state, where for a failure to furnish cars the penalty to be suffered is much larger than that incurred by a failure to furnish required cars in this state, whereby conflict and confusion in the conduct of appellant's interstate traffic would not only be brought about, but a direct and unreasonable burden imposed upon interstate commerce. * * * Would not the application of a statute or rule to such a state of facts and circumstances as appear in this record, necessarily, directly and unreasonably operate as a hindrance to and interference with interstate commerce? The court therefore holds that so far as interstate traffic is concerned, such a rule or statute is void."

"That cars engaged in interstate traffic, although unloaded and not in motion, are instrumentalities of commerce, seems clearly settled in Johnson vs. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct., 158, 49 L. Ed. 363, where the question arose whether a dining car regularly engaged in interstate traffic ceased to be so when waiting for the train to make the next trip, and it was held that it did not; the opinion of the court, after reviewing the contentions of counsel and authorities cited, saying: "Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for a train to be made up for the next trip.

It was regularly used in the movement of interstate traffic, and so within the law."

"Instrumentalities of commerce are, ex necessitate, a part of commerce, and if a car for an interstate shipment is to be regarded as a necessary instrumentality by which an interstate shipment is to be carried, and in fact a part of the interstate commercial duty of the carrier to furnish, then interstate commerce cannot be confined to the mere act of transit, since receiving, loading, unloading, switching, and delivery are as essentially parts of interstate commerce as the act of transit. It would not be contended that a state could forbid any of these things, as a more effectual way of prohibiting interstate commerce could not be devised; and if, instead of undertaking to forbid the furnishing of cars for interstate shipments, or the loading, or switching, or delivery, the state should undertake to regulate all these things, clearly, as it would seem upon reason and authority, that would be a regulation of an essential part of interstate commerce. Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 214, 5 Sup. Ct., 826, 29 L. Ed. 158; Stanley v. Wabash R. Co., 100 Mo., 435, 13 S. W. 709, 8 L. R. A. 549."

There is an elaborate citation of authorities and the case is referred to as one especially instructive on this point, although it would seem that the decisions of this Court to which we shall afterwards refer, dispose of the case.

Added force and emphasis are given to this decision by reason of the fact that the supreme court of Virginia, so far as may concern intrastate shipments has held a law or rule of this kind enforceable.

*Atlantic Coast Line Ry. Co. vs. Commonwealth*, 102 Va., 599; *same case*, 46 S. E. Reporter, 911.

In Texas the rule now seems to be settled.

Trinity and Brazos Valley Railway Company vs. Geppert, 135 S. W. Rep. 164, decided Feb. 11, 1911.

INTERSTATE COMMERCE—CONSTITUTIONAL LAW. Sayles' Ann. Civ. St. Supp. 1897-1904 Art. 4502e-d-e providing for penalties against railroads for each day freight is held after payment or tender of freight charges, or holding freight for collection of excess of freight thereon, is in conflict with the Act of Congress regulating interstate commerce and as to interstate shipments is void. The Court says:

"Appellant complains of the foregoing action of the court, and claims, that as the shipment was interstate, the law did not authorize recovery of a penalty, as the law relating to such a shipment was in conflict with an act of Congress. The statutes provide for the assessment of a penalty against railroads for each day freight is held after the payment or the tender of freight charges is made, or the holding of freight for the collection of excess of freight thereon. See Sayles' Ann. Civ. St. Supp. 1897-1904 arts. 4502-e-d-e. The contention of appellant that said penalty is not recoverable in this case is fully sustained by authority, the law being in conflict with Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901 p. 3154), regulating commerce, and as to interstate shipments of freight, and we hold as to the penalty appellee could not recover. Railway Co. v. Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; Railway Co. v. Peters, 15 Tex. Civ. App. 515, 40 S. W. 429; Railway Co. v. Carden, 34 S. W. 145."

In Pennsylvania, the rule seems to be well settled. The courts of that state have construed the same statute which was considered by the Interstate Commerce Commission in the case of Wilson Produce Company et al. vs. Pennsylvania R. R. Co., decided June 24, 1908, 14 I. C. C. Reports, page 170. Pennsylvania Railroad

Co. vs. M. O. Coggins Co., decided in 1909, 38 Pa. Spr. Ct. 129:

"1. The Pennsylvania Act of May 24, 1907, P. L. 229, provided maximum car service charges, including car storage charges, that railroad companies may impose, is invalid as to goods and cars engaged in interstate commerce, in view of the fact that Congress has legislated on the subject by Federal acts of Feb. 4, 1887, 24 Stat. at Large, 379, and June 29, 1906, 34 Stat. at Large, 584.

2. When goods are shipped from one state into another and upon arrival at their destination remain in the cars placed upon public sidings, they continue a part of the interstate commerce transaction until unloaded.

3. A state has no power to prescribe that a consignee, who has received a car the property of a common carrier of another state containing goods which have been consigned from another state, shall have practically three days of free time within which to unload the car, and shall, if he wishes, have the right to retain the car while standing upon the public sidings of the final carrier, for an indefinite period upon payment for the same at the rate of $1 per day."

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## MINNESOTA.

The general opinion of the bar of Minnesota is shown, we think, by the fact that this is the first suit, and the only one so far as we know, based upon this law as applied to interstate commerce. There have been and are many cases against common carriers based upon violation of the law with respect to intrastate commerce. This case stands alone in Minnesota as seeking to apply the law to interstate commerce. Indeed, the argument of the carriers when suit is brought based upon applica-

tion of this act to intrastate commerce, is that it is void, because it includes by its terms the movement of interstate commerce as well.

The argument of the Supreme Court in this case (Hardwick Farmers Elevator Company vs. C. R. I. & P. Ry. Co., 110 Minn., 25) is: (a) That state laws enacted in the exercise of police power and indirectly and remotely affecting interstate commerce, being in aid thereof and not a burden thereon, belong to the fourth class in the classification made by the court, namely, those powers which may be exercised by the state, but only until Congress shall see fit to act upon the subject. These laws are enforceable unless superseded by some act of Congress, if they are reasonable in their operation. The Minnesota Supreme Court says that the law in controversy conflicts with no congressional action previously taken or reasonably presumed; for the primary purpose of the interstate commerce act was to secure reasonable rates and to prevent unjust discriminations. It affects interstate commerce in an indirect or remote manner only. Neither its purpose nor its operation constitute a burden on such commerce. Its enforcement must tend to secure the prompt performance by the carrier of its common law duty to furnish cars for the transportation of freight, and thus to add to the volume of matter to be transported within and without the state. Without euphemism, it is in aid of commerce of both kinds. As was said in Seegers v. Seaboard, 73 S. C., 72, "the penalty is but a means to that end." The Court also gives its interpretation of the case in *Houston, Texas, Central Ry. Co. vs. Mays*, 201 U. S. 321.

As has been shown and as will be shown if we properly interpret the decisions of this court to which we will refer, Congress has certainly acted in this matter, as this Court has said more than once. The Hepburn Act especially refers to the duty of common carriers to furnish cars and other instrumentalities of commerce, and a complete answer is furnished, it would seem to us, by the fact that this court has, since the decision of the supreme court of Minnesota, decided that in times of car shortage, the Interstate Commerce Commission has complete jurisdiction with respect of the furnishing of cars. No mention is made by the supreme court of Minnesota of the controlling reason for the enactment of this statute, namely, to give Minnesota shippers a preference over other shippers and to prevent the railway company from permitting its cars to carry cargoes beyond its own line. No prominence is given, nor is any mention made, of the nature of the act of furnishing cars; that they are the necessary instrumentalities by which an interstate shipment is to be carried; and a part of the duty of an interstate carrier to furnish them as an element in interstate commerce, and that interstate commerce cannot be confined and limited to the mere act of carriage, because loading, unloading, switching and delivery are all quite as essentially elements of interstate commerce as the act of carriage itself. But there is suggestion made that, in the opinion of the Supreme Court of Minnesota, uniform congressional legislation would lack the flexibility and adaptibility of local laws. Yielding to no one in our respect for the Supreme Court of Minnesota, right here is the objection to the Minnesota interpretation of the Hepburn Amendment. There *is* congressional legislation upon this subject: it

is broad, ample, uniform. It is that very uniformity which strengthens and protects the movement of interstate commerce by carriers and the relation of carriers to the public. A cunningly devised and insidious provision penalizing a railway company for not furnishing cars to a Minnesota shipper, when under the same circumstances no such penalty attaches to the failure to furnish cars to the shipper of another state, can have but one result. But one result was contemplated by the law: that is, preference. Otherwise, there would be no reason for the enactment of the Minnesota statute as applied to interstate commerce. The penalty imposed in addition to actual damages or in the absence of any damages was intended as an object lesson to carriers in times when there are not enough cars to go around. And if this law shall be sustained by this court, the consequence may easily be foretold. If Minnesota can impose a penalty of one dollar per day per car for failure to furnish cars to be employed in interstate commerce, adjoining states will soon have a penalty of ten dollars or twenty dollars, or such amount as will insure preference in the delivery of cars. There is nothing in extending the excuses to be offered to a case not within the *power* of the railway company to furnish. It is within the *power* of the railway company to prevent its cars from moving off its own line, but this would mean complication, confusion, embarrassment and restriction in the movement of interstate commerce, which this court has so many times declared shall be free and unrestricted. One dollar per car per day, it is respectfully submitted, is simply the entering wedge for the imposition of a penalty which will be burdensome in the extreme.

The Supreme Court of Minnesota was entirely silent upon the subject of resulting preference to Minnesota shippers, if the law was applied to interstate commerce.

## VI.

THE MINNESOTA LAW BURDENS INTERSTATE COMMERCE AND GIVES A PREFERENCE TO MINNESOTA SHIPPERS.

"Reciprocal" as applied to the demurrage law is a misnomer.

"Demurrage" is a word of maritime origin. It means, of course, an allowance made to the master or owner of a vessel for delay or detention beyond the time allowed in her charter-party for loading or unloading.

There is little change in its meaning as applied to railway transportation. It is the charge which measures the value of the use of cars furnished by a carrier and retained by the consignor or consignee beyond the period of free time established by rule and custom for loading or unloading the cargo. The carrier charges a certain sum per day, termed by convenience "demurrage" for the use of the car for every day it is detained beyond the so-called free time. It is for the use of its cars that the carrier makes the charge. It is car service or car rental. It is often for the interest of the consignor or consignee to hold the car to save storage or other charges. Depriving the carrier of the use of the car, which otherwise might be employed in transportation, the shipper should and does pay the value of such car service or car rental, which usage and custom in the case of ordinary cars have fixed at $1 per day.

Will the court kindly note that a demurrage charge collected by carrier is not a penalty? It is not even an auxiliary remedy; it is the only remedy the carrier has. This is the end and the limit of its recovery. If its damages are one hundred fold, or if in case of car shortage and congestion it is quite impossible to measure the damages which the carrier may sustain by reason of the failure of the shipper to load the car or discharge the cargo, nevertheless the carrier is utterly without remedy save the right to demand the usual demurrage charge.

This situation, without the aid of any so-called reciprocal demurrage law, is not unfair to the shipper. The Railway Company may recover as its damages $1 per day for car service or rental beyond the free time. The shipper, on the other hand, may recover the damages which he has actually sustained by reason of the failure of the railway company to furnish cars for the carriage and transportation of his commodity. The measure of damages recoverable by the railway company is limited; the damages recoverable by a shipper in the event of failure to furnish cars is limited only by the sound judgment of the court or jury awarding such damages as may result from the carrier's breach of duty. But the so-called reciprocal demurrage law of Minnesota gives the shipper the right not only to recover his actual damages, which as a rule are awarded with a rather lavish hand, but in addition thereto, he is entitled to recover the penalty entitled "demurrage" fixed by law, and if during the period the carrier has failed to furnish cars there has been a rising market so that the shipper's profits may be greatly increased by the delay, he nevertheless, under this law, may recover his

so-called demurrage. Car service charges are made by the railway company to enable it to get possession of the cars, and fair compensation for their use. Demurrage charges contemplated by the Minnesota law are an unnecessary and unjust penalty for the reason, first, because the shipper has a perfect remedy at law which exactly measures the damage he has sustained, and second, it is for the interest of the railway company to furnish the cars at the earliest possible moment in order that they may be used in the transportation of commerce.

The manifest need and purpose of the adoption of the Minnesota law was to give an advantage to Minnesota shippers and consignees. Minnesota is a great grain growing state. At its terminals from four hundred to eight or even nine hundred cars of grain are received per day in the busy season. Substantially one-half the flour made in the United States is manufactured in Minnesota and carried to destination in the cars in which the flour is loaded. Wheat moves into Minnesota from far distant states.

Much of the coal consumed in Minnesota, South Dakota, North Dakota, Nebraska and Wisconsin is shipped by the Great Lakes through the Duluth gateway.

By reading between the lines, it is quite plain to be seen that at least one of the objects and purposes of the Minnesota statute was to prevent these staple commodities from being carried in bulk to destination. The necessary consequence of the enforcement of a law of this kind in the movement of interstate commerce

is to require the employment of more cars in proportion to Minnesota business than in other states or territories, and perhaps, though not necessarily so, proportionately more tracks and terminal facilities.

Does not the penalization of a carrier for its failure to furnish cars in a given locality, irrespective of any damage sustained by the shipper of interstate commerce, interfere with interstate commerce and place an undue and improper burden thereon? If this legislation should be sustained, it must result in a competition among the states in the imposition of penalties of the severest character, with the thought that the greatest penalty will secure the promptest car service. While such extreme penalization might differ in degree, it would not differ in kind, in the imposition of its burden upon interstate commerce. The manifest object and purpose of the adoption of this law by the Minnesota legislature are to induce the railway companies to give an advantage to Minnesota shippers or consignees. This would seem to be perfectly apparent because it takes no longer for one to load or discharge a cargo in Minnesota than in any other state. There is no pretense that the act is based upon conditions peculiar to this latitude or to Minnesota. Its moral effect is coercion to compel carrier to extend to shippers of one state favoritism. An argument is made that the excuses which the carrier may offer by section 11 of the Minnesota act include causes not within its *power* to prevent and this greatly relieves the carrier.

There is a wide fluctuation between the demands for transportation of commerce at different times and un-

certain periods. These periods cannot always be foreseen with absolute accuracy, but this law means that it is within the *power* of the railway company to have the cars on hand ready for such emergencies. It often happens that not only are many of the cars delivered beyond the carrier's own line for the transportation of freight over other roads, but delay also occurs by reason of the fact that some consignees hold foreign cars at terminal points awaiting sale of cargo, or because, owing to the cost of handling and the difficulty of storage, the car in which the interstate commerce is carried is often used by a shipper at terminal points as a convenient means of storage. And not only is this situation often presented, but when cars reach terminal points upon the carrier's own line, shippers often refuse to discharge the cargo because the car is a convenient and sometimes the most inexpensive means of storage. Sometimes the cars are held by foreign lines in the interest of cheaper carriage and higher standards of transportation to secure return cargo. This is not an accident, nor strike, and because this happens so often, it may well be argued that it should have been foreseen, and that the carrier should have a sufficient supply of cars to take care, at all times, of all unforeseen exigencies of this character. Probably not a year passes, except in periods of great depression, when for a short time there is not sufficient equipment to go around. This would not be an excuse to offer to the Minnesota shipper. It is within the power of the railway company, it would be argued, to have a sufficient supply of cars to take charge of all emergencies.

Congestion, extraordinary demands upon equipment, unexpected volume of business, though of short duration, are not recognized as excuses under the Minnesota statute. It must be something like a strike, a public calamity or an accident, or meaning, under familiar rules, a similar cause not within the power of the railway company to prevent. Because it is within the power of the railway company to prevent a delay on account of an unexpected demand, it would, doubtless, be argued that it was within the power of the railroad company to keep enough equipment in Minnesota to satisfy all demands, though out of proportion to that reserved for shippers in other states.

Under this statute, the Minnesota shippers are entitled to the particular number of cars which they want, whether at that particular time cars are loaded or unloaded, whether near Minnesota or at a great distance, whether motive power existed to move them, or yardage to hold them, whether there was absolute equality in the distribution of cars among different states and localities or not. The law was adopted for the express purpose of giving a preference to Minnesota shippers—not equality of distribution. Otherwise there is no reason for its alleged application to interstate commerce.

The record shows that of the entire business of the Chicago, Rock Island and Pacific Railway Company, eighty-five to ninety per cent is interstate business, fifteen to ten per cent is intrastate business. Upon the Dakota Division of the company (it is upon that division that the Hardwick Farmers' Elevator Company is located), ninety-five per cent measures the proportion of

interstate business, because this is entirely an agricultural territory. (See Transcript of Record, page 12, folio 16.)

We have purposely refrained from discussing the evidence offered in the case, and we have abbreviated the record with a view of presenting in the most direct manner possible the questions involved in this case, as we understand them. But, to illustrate the interference with interstate commerce, if application of the Minnesota statutes is to be made there can be no better example than that disclosed by the record. The grain on the Dakota Division of the Chicago, Rock Island and Pacific Railway Company really began to move about September 20th or 21st, 1907. It is not exaggeration (for exaggeration hurts, not helps) to state that the volume of business moving at the same time in the fall of 1907 was not only the greatest in the history of the railway company, but the greatest in the history of commerce, in any age or in any country. In normal years, harvest begins in Texas and Oklahoma about the middle of July, in Kansas about a week later; the grain crop in Minnesota, South Dakota and Iowa is the last to move—generally the last of August, or September, in each year. From Oklahoma and Texas, south-bound grain moves to the Gulf of Mexico, Galveston, Texas, being the principal seaport. Thence it is shipped to Liverpool and foreign ports. Grain also moves in considerable volume north to Chicago, Minneapolis and Davenport. Cotton moves also to the Gulf, although much Asiatic cotton is transported to Japan by way of Minnesota Transfer in the state of Minnesota. In 1907 harvesting of grain in the northern territory was somewhat

retarded by wet weather. For this reason, grain did not begin to move until about the 20th or 21st of September. There was an extraordinary congestion at Fort Worth, Texas, and at Galveston—a fact supported by the reports of the Interstate Commerce Commission and well known in the history of United States Commerce.

During the months of September and October (it was between the 19th of September, 1907, and October 22, 1907, that defendant in error demanded cars for movement of grain) the situation of railway companies, and especially this plaintiff in error, because of the movement of varied products along its line from the Lakes to the Gulf, was one which defied solution. At this time, the cotton planter with his cotton in the storehouse, station or sidetrack, was clamoring for cars in which to move his commodity to market. The producers of grain in other states where the harvest products move somewhat earlier in the year, were equally insistent. Should the empty cars referred to in the record have remained upon the Dakota Division until there was occasion for their use upon that Division, or should they have been used to move the product of the southern cotton grower or the grain producer whose situation was critical and who had immediate use for the cars? That unfortunately the railway company could not move the grain of the defendant in error as rapidly as it wished, is most true; but it is equally true that the Dakota Division of the railway company and the defendant in error received its full and ratable share of cars which were distributed throughout the territory without favor and without discrimination. The record, though much abbreviated, discloses the position of

defendant in error with respect to the situation in 1907. (See Transcript of Record, page 13, folio 17.) The testimony of defendant in error was addressed to the fact that certain empty cars, which earlier in the year were upon the sidetracks of the Company's Dakota Division, should have there remained until they were needed somewhat later in the year to carry the grain to the markets. At this very time the Arkansas cotton planter was demanding cars for the movement of his cotton. In Arkansas, if the law applies to the movement of interstate commerce, the penalty was $5 per car per day for failure to furnish equipment. In Texas it was $25 per car per day in the event of failure to supply cars with certain exceptions, unnecessary to be noted here.

This is in no sense a discussion of the evidence, but a reference to it by way of illustration of the discrimination and favor which would flow from an enforcement of this law as applied to interstate commerce.

May the carrier pay, or be compelled to pay a Minnesota shipper an enforced penalty—a form of terminal charge—when the Iowa or Wisconsin shipper can secure no such advantage? Would not this be discrimination, apart from any consideration of the desirability of prompt car service and the excuses which may or may not be offered for failure to deliver cars within the time limited by the act? In these days of intense competition, with increased volume of business and a constantly narrowing margin of profit, a payment of twenty dollars, or even one dollar a car per day to a Minnesota shipper in addition to actual damages, if any, overlooking actual benefit if any there be, when under precisely the same

circumstances, from a shipper of interstate commerce in Wisconsin or Iowa such a payment may be withheld, is certainly, it so seems to us, discrimination. The very fact that demand for cars to move interstate commerce is throughout a carrier's entire territory a variable quantity and not susceptible of exact computation, discloses the purpose of the Minnesota statute. That this demand for cars is a variable quantity in respect of which the best judges may in their forecast of the necessities and demands of commerce be mistaken, illustrates also the unjust consequences which would result from its enforcement. An enforced penalty for failure to furnish cars, like any other form of demurrage, is a terminal charge. The state cannot burden interstate commerce with a charge of this nature. The declared governmental policy and the authorities alike forbid this. The entire subject is under the control of the Interstate Commerce Commission. The objection that the state cannot impose upon the carrier a terminal charge upon the movement of interstate commerce for the benefit of the Minnesota shipper, is fundamental; it is jurisdictional.

At the last session of the National Association of Railway Commissioners, it was announced that there is now a uniform code of demurrage rules from the Atlantic to the Pacific, and from Canada to the Gulf, upon all interstate traffic. There is now absolute uniformity. This would no longer be the case if the Minnesota law were applied to interstate commerce.

## VII.

## DECISIONS OF FEDERAL COURT UPON THIS SUBJECT.

One of the first decisions of the Commerce Court was to the effect that if a shipper objected to a carrier's demurrage rule, he must make application to the Interstate Commerce Commission for relief.

See Commerce Court decision, Proctor & Gamble vs. United States, 188 Fed. 221.

The circuit court of the district of Oregon, July 31, 1911, construing the Oregon statute, *Southern Pacific Company vs. Campbell, et al*, 189 Federal, 696. The syllabus is as follows:

> "Commerce—interstate commerce—regulation by states. Laws of Oregon, 1907, page 82, section 27, requiring all railroads to switch at a reasonable compensation and to deliver without discrimination or unreasonable delay any freight or cars, loaded or empty, destined to any point on their tracks or connecting lines, includes interstate as well as intrastate commerce, and makes exchange of all kinds of freight mandatory on connecting railroads, and is invalid as interfering with interstate commerce, and an order of the state railroad commission to enforce the provision is invalid."

A person engaged in conducting an interstate express business cannot be required by the state or municipal authorities to take out a local license as a prerequisite of conducting his interstate business within the state or municipality.

Barrett vs. the City of New York; Wells Fargo & Co. vs. same, 189 Fed. 268, June 20, 1911.

The Circuit Court of Appeals of the Third Circuit, in affirming an opinion of the lower court (see Lehigh Valley Railroad Company vs. United States; Philadelphia & Reading Ry. Co. vs. same; Bethlehem Coal Co. vs. same; reported in 188 Federal, 879, decided June 13, 1911) decided that *demurrage charges for* the detention of cars *either in loading or unloading*, is a terminal charge required to be shown by the schedule of rates and to be filed and published by an interstate railroad company by the terms of the interstate commerce act, as amended by the so-called Hepburn law; and that this law defines transportation as including all the instrumentalities and facilities of shipment, and all services in connection with the receipt, delivery and handling of property transported, and required the filing and publishing of schedules showing all rates, fares and charges for transportation, stating separately all terminal charges; and that any departure by an interstate railroad company from demurrage charges fixed by it, by its filed and published schedules constitutes a misdemeanor under the Elkins Act.

"That demurrage charges, fixed by rate schedules of an interstate railroad in certain districts were discriminatory, is no defense to a prosecution of a railroad company for granting or receiving a concession by cancellation of such charges. The only legal method of correcting the discrimination is by a change in schedules, on proper notice or under authority from the Interstate Commerce Commission."

This case had to do with demurrage charges only. There were outstanding demurrage bills in favor of the

railway and against the steel company which accrued from January, 1901, to August 26, 1906. These amounts were cancelled on the ground that they were incorrect, and the Court says that, in view of the fact that they accrued before the Hepburn Act went into effect, they were not made the subject of indictment, but from September 1906, after the law became effective, demurrage charges had accrued from the steel company to the railway company, aggregating more than $40,000.

The failure to collect these demurrage charges accruing after the adoption of the Hepburn law and their cancellation and remission, induced the Court to impose a fine of $20,000 against the Philadelpha and Reading and the Lehigh Valley for failure to collect, and against the Bethlehem Steel Co. for failure to pay these demurrage charges. Among other things, the court adopts the following propositions:

(a) The words "instrumentalities and facilities of shipment or carriage and services in connection therewith" must include terminal charges.

(b) Demurrage being a charge for detention of a car, either because of failure to load or to unload, is a terminal charge.

(c) Demurrage charges being part of transportation are required to be filed by the Commission. Among other citations, the Circuit Court of Appeals makes the following:

> "Beyond all possibility of doubt, therefore, the duty of regulating terminal charges when related to interstate transportation has been lodged with the Interstate Commerce Commission, and federal courts have so held."

*Wilson Produce Co. vs. Pennsylvania R. R. Co.*, 14 Interstate Commerce Reports, 170, 174.

"It does not appear to be necessary to do more than refer to the decision of the Commission, in Wilson Produce Company vs. Pennsylvania Railroad Company, 14 Interstate Commerce Reports, 170, in which it was held that the duty of regulating terminal charges when relating to traffic between the states, has been lodged with the Commission, and the cases there cited."

*Peale, Peacock & Kern vs. C. R. R. of N. J.*, 18 Interstate Commerce, 25, 33."

The Circuit Court of Appeals also cites Michie vs. N. Y. N. H. & H., 151 Federal Reporter, page 694:

"The phrase of the statute 'delivering, storage or handling' is broad enough to include demurrage."

The Court refers to United States vs. Standard Oil Co., 148 Federal, 719:

"The law requires the published tariff to show everything in the way of terminal regulations which in any way affects the cost of the service rendered by the carrier, and such published terminal charge is no less binding on the parties than is the tariff specified for the transportation." In Interstate Commerce Co. v. Detroit, etc. Ry Co., 167 U. S. 633, 17 Sup. Ct., 986, 42 L. Ed. 306, Mr. Justice Shiras said on page 645 of 167 U. S., page 990 of 17 Sup. Ct.: "It may well be doubted whether cartage, when furnished without charge, comes within the meaning of the phrase 'terminal charges,' or can be regarded as 'a rule or regulation,' which in any wise 'changes, affects, or determines' any part or the aggregate of the rates, fares and charges. • • • Much should be left to the judgment of the Commission."

The Court also declares the following authorities in point:

Rhodes vs. Iowa, 170 U. S., 412, 18 Sup. Ct., 664, the moving of goods from the platform to the freight warehouse was a part of interstate commerce transportation.

*Bowman v. Chicago, etc. Ry.*, 125 U. S., 465; *McNeil vs. Southern Ry. Co.*, 202 U. S., 543.

The Court also states:

> "To hold otherwise than that demurrage is part of transportation and part of terminal charges, would be to open the door to a railroad company to allow favored patrons to occupy the tracks and cars for such demurrage charges as they chose. Transportation includes the hiring of the vehicle and the hauling of it to destination * * *. The aggregate of the rates is therefore affected and clearly comes within the Hepburn act.

The Court also cites Baltimore & Ohio R. R. vs. Pitcairn Coal Co., 215 U. S., 481, 30 Sup. Ct., 164:

> "The rates were fixed by the tariff filed and could not be departed from. The law did not intend that the railroad and shipper could alter these charges, because that would do away altogether with the purpose sought by the act."

This case illustrates the importance of this item of demurrage. The record shows that on July 24, 1908, the demurrage charges amounted to $73,400.

## DECISIONS OF THE SUPREME COURT.

A reciprocal law something like the Minnesota statute was considered by this Honorable Court a short time

before the adoption of the Hepburn act. We have seen, it so seems to us, that this Hepburn law greatly broadened the authority of the Interstate Commerce Commission, and made positive direction with respect of its duties in the matter of furnishing cars; but before the Hepburn amendment, this Court considered the so-called reciprocal demurrage law of the state of Texas.

> "When applied to interstate shipments, the provisions of the Texas Revised Statutes, and articles 4497-4500 as amended by the Acts of 1899, page 67, which penalize the failure of a railway company to furnish cars to a shipper within a certain number of days after the latter's requisition in writing in the sum of $25 per day for each car not so furnished, and admits of no excuse except such as arises from 'strikes or other public calamity,' is an unconstitutional regulation of interstate commerce."

Among other things, the Court says:

> "In this connection the recent case of Central R. Co. vs. Murphy, 196 U. S., 194, 49 L. Ed. 444, 25 Sup. Ct. Rep. 218, is instructive. In that case we held that the imposition by a state statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where or how, and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution; and an act of the legislature of Georgia imposing such a duty on common carriers was held void as to shipments made from points in Georgia to other states.
>
> Although the statute in question may have been dictated by a due degard for the public interest of the cattle raisers of the state, and may have been intended merely to secure promptness on the part of

the railroad company in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties, for trivial, unintentional and accidental violations of its provisions, when no damages could actually have resulted to the shippers * * *. The duty of the railroad company to furnish the cars within the time limited is peremptory and admits of no excuses, except such as arise from strikes and other public calamities. If, for instance, the owner of a large quantity of cotton should make a requisition under the act for a number of cars, the railway company would be bound to furnish them upon the day named, or incur a penalty of twenty-five dollars for each car, though the detention of the cotton involved no expense to the owner or may even have resulted in a benefit to him through a rise in the market.

While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance."

There is a slight difference in language between the Minnesota statute and the Texas law then under consideration. The Texas statute admitted of no excuse for the furnishing of cars, except such excuse as may arise from strikes or other public calamity. The Minnesota statute excepts "strikes, public calamities, accidents or any other cause not within the power of the railroad company to prevent." For ready reference, permit us

to cite the exact wording of section 11 of the Minnesota statute:

> "SUSPENSION ON ACCOUNT OF STRIKES, ETC. Sec. 11. The period during which the movement of freight or furnishing cars is suspended on account of strikes, public calamities, accident or any cause not within the power of the railroad company to prevent, or during which the loading or unloading of freight by shipper or consignee is delayed by reason of inclement weather which would make loading or unloading impracticable, or any cause not in the power of said shipper or consignee to prevent, shall be added to the free time allowed in this act and counted as additional free time."

There is nothing, it is respectfully submitted, in the difference of language. The Minnesota statute is somewhat broader. Still, the Minnesota statute refuses to accept from the carrier any excuses for delay in furnishing cars, if it is within the power of the company to have furnished them. The well known purpose of the Minnesota statute, to prevent cars from moving off carrier's line, is in no manner affected by these exceptions.

The Mays case was decided before the Hepburn law was adopted. The Hepburn law relates to and regulates the subject of furnishing cars as this court has held more than once, and commits the entire matter to the regulation of Interstate Commerce Commission. Since the adoption of the Hepburn act this subject has, we submit, been considered and determined by this court.

Baltimore & Ohio R. R. Co. vs. Pitcairn Coal Co., 215 U. S., 481; same case, 30 S. C. R., 164.

The Court decided that the Interstate Commerce Commission had full and complete jurisdiction in times of car shortage. The syllabus in this case is as follows:

> "The grievances produced by regulations adopted by a railway company for the distribution of coal cars in times of car shortage to the bituminous coal mines served by it, which are alleged to violate the provisions of the act to regulate commerce of February 4, 1887 (24 Stat. at L. 380, chap. 104), prohibiting unjust preferences or undue discriminations, cannot be redressed, in advance of the action of the Interstate Commerce Commission, by mandamus to prohibit the acts complained of and prescribe a rule or regulation for the future, since the provisions of the act of March 2, 1889 (25 Stat. at L. 862, chap. 382 U. S. Comp. Stat. 1901, 3172), Sec. 10, authorizing mandamus to compel the furnishing of cars and other facilities for transportation, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to the orders of the Commission, rendered within the lawful scope of its authority, until set aside by the Commission or enjoined by the courts."

The Court, in effect, holds not only that the Interstate Commerce Commission has jurisdiction in the matter of the distribution of cars, but that in advance of the application to the Interstate Commerce Commission, the Court is without authority to compel the furnishing of cars except in cases in which the performance of this duty is so plain and so independent of previous administrative action of the Commission as not to require application to that body. The decision

is directly in point, it seems to us, and the complaint in the case was that there was an improper distribution of cars. This was the occasion of the suit and resulted in the decision referred to.

Another authority quite in point is Interstate Commerce Commission vs. Illinois Central Ry., 215 U. S., 452; same case, Vol. 30 S. C. R., 155. The syllabus is as follows:

> "Commerce, in the constitutional sense, includes the instrumentalities by which it is carried on, and extends to the coal cars owned by a railroad engaged in interstate commerce in which it receives from the tipple of the coal mines along its line, coal purchased by it and used solely for its own fuel purposes. Authority to regulate the distribution of a railway company's fuel cars in times of car shortage to the bituminous coal mines along its line was delegated to the Interstate Commerce Commission by act to regulate commerce as a means of prohibiting the unjust preference or undue discrimination forbidden by section 3 of that act."

This would seem to answer the suggestion advanced by the Supreme Court of Minnesota, that Congress had not acted. Congress not only has acted, but the Interstate Commerce Commission is invested with complete and plenary power in the premises. Again, in the case of St. Louis, Southwestern Railway Company vs. Arkansas, 217 U. S., 136; same case, 30 S. C. R., 476, this Court decided:

> "2. Interstate commerce is unconstitutionally regulated by Kirby's Ark. Dig. Secs. 6803, 6804, making it the carrier's duty to supply cars to shippers on demand, under which a carrier will either be compelled to desist from the interchange of cars with connecting lines for the purpose of moving

> interstate commerce because of a refusal of the state courts to permit it to avail itself, as causing and excusing its default, of the rules and regulations adopted for the interchange of cars by the American Railway Association, which govern 90 per cent of the railways in the United States, or will be obliged to conduct such business with the certainty of being subjected to the heavy penalties provided by the statute."

See the recent case of Union Pacific Railroad Co. vs. Updike Grain Co., decided December 4th, 1911. Advance sheets of U. S. Supreme Court 1911 Term, page 39. This involves really a practice and regulation of demurrage.

The Union Pacific R. R. Co., anxious to expedite the discharge of cargoes of grain, determined that an allowance would be made to certain elevator companies upon its line if the cars were returned within forty-eight hours. But in the case of foreign cars delivered to certain other elevators not upon its line under certain conditions referred to in the opinion there would be no such allowance.

The Court said:

> "The carrier cannot pay one shipper for transportation service, and enforce an arbitrary rule which deprives another of compensation for similar service."

The case of Southern Railway Company, plaintiff in error, vs. D. L. Reed, and wife, defendants in error, to the Supreme Court of the State of North Carolina, decided January 9, 1912 (published in Supreme Ct. Rep. Vol. 32, p. 140) is perhaps the last decision upon this

proposition. The question in that case was the validity of an act of the State of North Carolina, requiring the agents of railway companies to receive freight for transportation whenever tendered at a regular station, and every loaded car tendered at a sidetrack or in warehouse connected with the railroad by a siding and to forward the same by a route selected by the person tendering the same, under penalty of forfeiting fifty dollars a day to the aggrieved party for each day of refusal to receive such freight, and all damages actually sustained. The statute was as follows:

> "Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment. (Code of North Carolina, 1905, Sec. 2631.)"

In this case it appears that when demand was made that the freight concerned in suit should be forwarded, the railway company's agent advised the shipper that there was no established rate for shipment, and that he

had no authority to receive the goods or to issue a bill of lading to final destination, in the State of West Virginia. Suit was brought for damages and penalties, and judgment was awarded to shipper as prayed. The Court says:

> "It hardly needs to be stated that transportation of property between states is interstate commerce and may be of federal rather than state jurisdiction. We say *may* be of federal jurisdiction, for interstate commerce in its practical conduct has many incidents having varying degrees of connection with it and effect upon it, over which the state may have some power."

The Court thereupon makes classification of various controversies which have arisen with respect of the power of the state over the general subject of commerce:

> "It is undoubtedly the duty of a railway company to receive freight when tendered for transportation. It may besides have other obligations but it does not follow that it is within the power of the state to enforce them. There may be a federal exertion of authority which takes from a state the power to regulate the duties of interstate carriers or to provide remedies for their violation. This is realized by defendants in error, and they assert that the state statute is in aid of commerce and not an interference with or burden upon it, and therefore must be sustained as a valid exercise of the state's power." (Citing certain cases.)
>
> "* * * It is well settled that if the state and Congress have a concurrent power that of the State is superseded when the power of Congress is exercised: * * * The principle of that case (Mo. Pac. Ry. Co. vs. Larrabee Commissioners, 211 U. S., 612) therefore, requires us to find specific action either by Congress in the interstate commerce act, or by the commission covering matters which the

statute of North Carolina attempts to regulate. There is no contention that the Commission has acted, so we must look to the act. Does it, as contended by plaintiff in error, take control of the subject matter and impose affirmative duties upon the carrier which the state cannot even supplement? In other words, has Congress taken possession of the field? * * * It is evident that Congress has taken control of special rate-making and charging * * *. The provisions of the act are directed at the abuses most to be feared, unreasonableness in rates and discriminations, including in the latter *discriminations in service, in acceptance and in delivery of freight and in the facilities furnished.*"

(The italics are not found in the opinion.)

The Court then refers to the cases of the Texas & Pacific Ry. Co. vs. Abiline Oil Co., 204 U. S., 426, 437, and to Baltimore & Ohio R. R. Co. vs. Pitcairn Coal Company, 215 U. S., 481.

The Court reviews the decision in Baltimore & Ohio vs. Pitcairn Coal Company, 215 U. S., 481, and remarks that defects and deficiencies had been discovered in the act to regulate interstate commerce, and the object and purpose of the amendment of 1906 was to enlarge the powers of commissions, and that "The distribution of coal cars by the railroad company among shippers, was a matter involving preference and discrimination and within the competency of the Interstate Commerce Commission to consider."

The Court refers to the definition of "transportation," meaning physical instrumentalities, etc., and emphasizes

the provision of the statute that such transportation the carrier

> "must provide and furnish upon reasonable request therefor * * * 'There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of * * * The Supreme Court of North Carolina decided, as we have seen, that the statute deals with the common law duty simply, one which attaches before freight enters into interstate commerce and hence concluded, as follows: 'The statutory enforcement under penalty of the common law duty to accept freight "whenever tendered" is not within the scope or terms of any act of Congress. It is neither an interference with it nor a burden upon interstate commerce.' We are unable to agree with the conclusion. *It would destroy absolutely federal control until the freight was in the possession of the carrier and is directly contrary to the provision of the interstate commerce act which we have quoted.*

See in this connection, Houston & Texas Pac. R. R. Co. vs. Mays, 201 U. S., 321. In the term "transportation," as we have seen, Congress has included all services in connection with the receipt of property transported, and this certainly imposes an obligation to receive the property as well as to carry it, one of the obligations the carrier must perform 'upon reasonable request therefor.' Other provisions of the same import and direction might be quoted. Conditions put on the receipt of articles at the railroad station may be conditions upon the traffic, and necessarily are within the regulating power of Congress. *Their inducement and aim may be to secure a prompter performance of duty by the carrier, and so far beneficent. But that is not the question. The question is: Where is the control, in the state or Congress, and has Congress acted?* That the control is in Congress we have

seen; that it has acted is demonstrated by the provisions of the interstate commerce act, to which we have referred * * *. By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the commission the rates charged and the action of the railroad in regard to them, and to secure their reasonableness and to secure *their impartial application* * * *. We cannot assume that it was without consideration of its necessity that Congress enacted section 2 of the Hepburn act. It was no doubt the adaptation of experience to the exigencies of a practical problem."

"* * * If a penalty of fifty dollars for refusing to receive freight when tendered, be no burden upon interstate commerce beyond the power of the state to impose, would a penalty of one hundred dollars, or one thousand dollars, likewise be no burden? May not the power which is competent to impose a penalty select its amount? The penalty of the North Carolina statute it is to be remembered is independent of the damage received and what excuses or defenses may be offered the decisions of the court leave in doubt * * *. The plaintiff sued for $750 for refusal to receive and forward a carload of shingles and recovered $350, although one of them testified that they 'never lost a cent.' The circumstance was declared by the court, citing a prior case, to be immaterial, as the penalties were not given on the idea of making pecuniary compensation to the party injured, but usually for more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment. *The policy of the statute then is to require the acceptance of freight when tendered, with daily accumulating penalties upon refusal to do so. If such power be conceded, what is the limit of its exercise either as to condition or penalty?*"

See also Northern Pacific Ry. vs. State, 32 S. C. Rep. 160.

Mondon vs. Ry., 32 S. C. R. 169.

When it is conceded, as it seems to us it must be, by virtue of the force of the decisions of Lehigh Valley Ry. Co. vs. United States; Philadelphia & Reading Coal Company vs. same; Bethlehem Steel Co. vs. same; U. S. Circuit Court of Appeals, reported in 188 Federal, 879, that the Hepburn act covers demurrage charges, that would seem to dispose of the case.

It is, therefore, respectfully submitted that the judgment of the State Supreme Court should be reversed.

EDWARD C. STRINGER,
MCNEIL V. SEYMOUR,
EDWARD S. STRINGER,
*Counsel for Plaintiff in Error.*

## APPENDIX I.

## MINNESOTA RECIPROCAL DEMURRAGE LAW.

### Chapter 23—H. F. No. 2.

*An Act regulating the handling of freight in carload lots by railroad companies, shippers and consignees, and equalizing car service and penalties, for the use and detention of cars and failure to furnish cars and transport the same.*

Be it enacted by the Legislature of the State of Minnesota:

RAILROAD COMPANIES TO FURNISH CARS WITHOUT DISCRIMINATION — CHARGES — APPLICATION — HOW MADE—FORFEITURE FOR FAILURE TO SUPPLY CARS.

Section 1. It shall be the duty of any railroad company to furnish suitable car or cars to every and all persons, without discrimination, who may apply therefor in good faith for the transportation of any and all kinds of freight and to receive and transport such freight with all reasonable dispatch, and to provide and keep suitable facilities for the receiving and handling of same at any station or public switch on the line of its road, and also to receive and transport in like manner the empty or loaded cars furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged, or reloaded and returned to the road so connected; and for compensation it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad for a like service.

When the owner, manager or shipper of any freight of any kind shall make application in writing to any superintendent, agent, or other person in charge of transportation of any railroad company, at any point that cars are desired in or upon which to ship any freight, it shall be the duty of such railroad company to supply the number of cars so required at the point indicated in the application

within a reasonable time thereafter, not to exceed forty-eight hours at terminal points and seventy-two hours at intermediate points, from the receipt of such application, Sundays and legal holidays excepted, and shall supply such cars to the person or persons so applying therefor in the order in which such applications are made, without giving preference to any person; provided, that if the application be for more than three cars, the railroad company may have one additional day in which to supply each additional car so ordered.

Said application for cars shall be in writing, stating the number of cars wanted; the time and place desired, and said application shall state the character of freight and its final destination. To facilitate the making of the application in writing, every railroad company doing business in this state shall provide suitable blanks for that purpose to be kept at all freight offices; and it shall be the duty of every such railroad company, upon the request of the applicant, to furnish him a duplicate of such application.

When cars are applied for under the provisions of this chapter, if they are not furnished within the time herein stated, the railroad company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of one dollar per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, together with all damages such applicant may have sustained.

LOADED CARS—HOW MOVED—FORFEITURE FOR FAILURE. Sec. 2. Any railroad company mentioned in Section 1 of this act, upon receipt of notice from a shipper that one or more cars have been loaded by such shipper and are ready for delivery to such company at the place of loading thereof, to be carried on the road of such company towards the destination thereof, shall remove such car or cars from such loading point and forward

the same towards destination within twenty-four hours after receiving such notice, Sunday and legal holidays excepted; and for every delay of twenty-four hours or fraction thereof after the expiration of the period therein allowed for the removal thereof, such railroad company shall forfeit to such shipper the sum of one dollar for each and every car, not so removed within the period herein provided, together with all damages he may have sustained by failure so to remove.

DUTY OF CONNECTING RAILROAD AND FORFEITURE FOR DELAY—CARS TO BE MOVED WITHIN 24 HOURS. Sec. 3. Any railroad company mentioned in section 1 of this act, which shall receive from a connecting railroad company one or more cars of freight consigned to any point on or beyond its line, shall within twenty-four hours after such car or cars are offered to it, or are placed on its transfer or other track, forward said car or cars over its railroad toward destination; and for every delay of twenty-four hours or fraction thereof on the part of said railroad company in forwarding said car or cars beyond said allowed period of twenty-four hours, said railroad company shall forfeit to the party injured by such delay the sum of one dollar for each and every car so received and not forwarded upon its line within the time above allowed together with all damages he may have sustained.

AVERAGE SPEED PER DAY—FORFEITURE FOR NON-COMPLIANCE. Sec. 4. When any railroad company in this state shall have received from any shipper or from a connecting railroad, for shipment over its railroad one or more cars of freight, it shall be the duty of such company receiving such car or cars of freight within twenty-four hours thereafter to start the same forward from the place of shipment toward the place of destination, and after being started forward, such car or cars of freight shall be continued in transit toward the destination thereof at a rate of not less

than an average speed of fifty miles per day of twenty-four hours; and upon the failure of such railroad company to transport such car or cars at the speed herein indicated such railroad company shall forfeit to the consignee thereof one dollar for each and every car for each twenty-four hours or fraction thereof consumed in the transportation of said car or cars in excess of the time herein prescribed; and, in ascertaining the time consumed in the shipment of such car or cars, the time shall begin to run twenty-four hours after the date of the bill of lading or receipt given for said car or cars by said railroad company, which bill of lading or receipt shall be received by the courts of this state as prima facie evidence of the time when said car or cars were received by such company.

CARS TO BE DELIVERED TO CONSIGNEE WITHIN 24 HOURS—ARRIVAL—FORFEITURE FOR FAILURE. Sec. 5. It shall be the duty of every railroad company mentioned in section 1 of this act, to deliver at the usual place of unloading by the consignee all cars of freight hauled by it for delivery to said consignee within forty-eight hours, Sundays and legal holidays excepted, after the same shall have reached its point of destination, and for each and every delay of twenty-four hours or fraction thereof in not so delivering the same after the expiration of the time herein prescribed, said railroad company shall forfeit the sum of one dollar for each and every car not so delivered within the time herein allowed.

SHIPPER TO LOAD WITHIN 48 HOURS—FORFEITURE FOR FAILURE. Sec. 6. It shall be the duty of any shipper in compliance with whose request any railroad company mentioned in section 1 of this act, has placed one or more cars at the usual loading point of said shipper, to fully complete the loading thereof, ready for re-delivery to said railroad company within forty-eight hours after the same shall have been placed at such load-

ing point, Sundays and legal holidays excepted, which full period for loading is allowed the shipper free from demurrage charges; and for every twenty-four hours or fraction thereof of delay beyond said period in so loading said car or cars such shipper shall become indebted, and on demand shall pay, to said railroad company the sum of one dollar for each and every car so placed and not loaded and ready for re-delivery within the time allowed herein.

TIME LIMIT FOR UNLOADING—FORFEITURE FOR FAILURE. Sec. 7. It shall be the duty of the consignee of each and every car delivered by any railroad company mentioned in section 1 of this act, at the usual place of unloading by the consignee to fully unload such car or cars within 72 hours for bituminous coal, bulk lime, fruit, or vegetables, or lumber shipments, and 48 hours for other shipments, from the time the same shall be placed at the usual unloading point of the consignee, which full periods are allowed the consignee for unloading free from demurrage charges; and for each and every delay of 24 hours or fraction thereof, on the part of the consignee in unloading such car or cars beyond the said above periods respectively, the consignee shall become indebted, and on demand shall pay, to the railroad company delivering such car or cars, the sum of one dollar for each and every car not so unloaded within the time herein prescribed.

BILLS OF LADING TO SPECIFY TIME—WEIGHTS, ETC.—TO BE ADMITTED AS PRIMA FACIE EVIDENCE—PENALTY FOR NEGLECT OR REFUSAL BY RAILROAD COMPANIES. Sec. 8. For all shipments of freight in carload lots on the railroads mentioned in section 1 of this act, proper bills of lading showing the date of delivery to such railroad company, the weights and the marks and numbers of each car so shipped, shall be issued by the railroad comp-

any and delivered to the shipper at the time of receiving such car or cars; which bill of lading when offered by any party in any cause pending in any court in this state, shall be received and admitted in evidence by such court as prima facie evidence of the time when delivery of such car or cars was made by the consignor to such railroad company and of the weights and the contents thereof when so delivered to such company, and such railroad company shall be subject to a penalty of one hundred dollars for its neglect or refusal to furnish such shippers such bill of lading for each car so received by it.

RAILROAD COMPANIES TO GIVE NOTICE OF ARRIVAL OF CAR—INTERPRETATION OF NOTICE. Sec. 9. Railroad companies shall within twenty-four hours after arrival of any car or cars give notice to the consignee of the arrival of such car or cars, together with the amount of freight charges due thereon.

The notice as referred to in this act, may be either actual or constructive. When the consignee or agent is personally served with notice of arrival of car or cars at or before 6 P. M. of any day, free time shall begin at 7 A. M. of the day after such notice shall have been given. Constructive notice consists of posting notice by mail to consignee. When this method of notice is adopted there shall be 24 hours additional free time.

DEMURRAGE CHARGES NOT TO INVALIDATE CLAIM FOR DAMAGES. Sec. 10. The payment by said railroad company of demurrage provided in this act, shall in no way invalidate or offset any claim any shipper or consignee may have or make for damages occasioned by delay on the part of such railroad company, or other cause, but shall be a further remedy and in addition to any already existing. Nor shall anything herein contained be held to lessen the duties of any common carrier in the shipment of live stock or other perishable property.

SUSPENSION ON ACCOUNT OF STRIKES, ETC. Sec. 11. The period during which the movement of freight or furnishing cars is suspended on account of strikes, public calamities, accident or any cause not within the power of the railroad company to prevent, or during which the loading or unloading of freight by shipper or consignee, is delayed by reason of inclement weather which would make loading or unloading impracticable, or any cause not in the power of said shipper or consignee to prevent, shall be added to the free time allowed in this act and counted as additional free time.

COMPANIES TO REPORT MONTHLY ON DEMURRAGE CHARGES PAID OR COLLECTED. Sec. 12. It shall be the duty of every railroad company operating within the state of Minnesota to make at the end of each month a sworn detailed report of all penalties paid and collected as demurrage during the previous month, showing therein to whom paid or from whom received; this report shall be filed with the railroad and warehouse commission.

ACTIONS TO ENFORCE CHARGES. Sec. 13. When suit is brought to collect any of the damages, forfeiture or demurrage charges, provided for in this act, said suit may be brought in any court in this state having jurisdiction of the subject matter and parties under the then existing cause; and if the plaintiff therein recover judgment such plaintiff shall also recover a reasonable attorney's fee for bringing such suit, to be taxed as costs in other cases and paid as other costs by defendant in such suit.

TO TAKE EFFECT JULY 1, 1907. Sec. 14. This act shall take effect and be in force from and after July 1, 1907.

Approved April 17, 1907.

# Supreme Court of the United States

October Term, 1966

No. 1

[redacted]

Petitioner,

v.

[redacted]

Respondent.

On Petition for Writ of Certiorari to the [redacted]

[redacted]

[redacted]

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# Supreme Court of the United States.

No. 242. OCTOBER TERM, 1911.

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CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

*Plaintiff in Error,*

vs.

HARDWICK FARMERS ELEVATOR COMPANY,

*Defendant in Error*

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## BRIEF OF DEFENDANT IN ERROR.

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(*Wherever herein words are italicized, that has been done by counsel, unless otherwise indicated*).

Chapter 23 of the Laws of Minnesota for 1907 (commonly known as the Reciprocal Demurrage Act) is involved in the writ of error in this case in so far as that Act seeks to compel railroad companies to furnish cars to shippers. The portions of the Act involved herein are found in sections 1, 10, 11, 12, 13 and 14.

Two questions are raised by counsel for plaintiff in error. The first is whether the said Chapter 23 may be applied to interstate shipments, and the second is whether the said Act is in violation of the United States Constitution.

## I. ACT APPLIES TO INTERSTATE SHIPMENTS.

If we understand correctly the brief of plaintiff in error in this case, it is not seriously contended that Chapter 23 of the Laws of Minnesota for 1907 does not by its terms apply as well to interstate shipments as to intrastate shipments. The language of the act is plain, and if the legislature intended to limit the law to intrastate shipments, it certainly would have employed words of limitation to that effect. The phrase used is "any railroad company." The language is very broad, and in view of the Mayes case, (referred to more fully hereafter) which was before the Legislature when this law was enacted, it was the clear intention to make this law apply to interstate as well as intrastate shipments. If this law is held void as to interstate shipments, it is void as to intrastate shipments. If the law is cut down by construction to apply only to intrastate shipments, then it directly burdens and interferes with interstate commerce, because by reason of penalties imposed it necessarily requires carriers to discriminate in favor of a local shipment and shipper against the interstate shipments and shippers in furnishing of cars. The only logical position to take is to hold the law good or bad as to both kinds of shipments. The Minnesota Supreme Court did not think there was any room for doubt as to this, saying, "By its terms it applies to both intrastate and interstate commerce." (Transcript of Record, page 30.) The Minnesota Supreme Court having adopted this construction of the statute, this Court is necessarily bound by the same.

C. M. & St. P. R. R. Co. v. Minn., 134 U. S. 418.

## II. ACT IS CONSTITUTIONAL.

**a. Demurrage defined—purpose of the act—the act is beneficent.**

"Demurrage" as used in railroad circles is defined to be a compensation to the railroad company for an undue detention of cars by the shipper. It means the charge which the shipper must pay to the carrier, either because he consumes more than the free time usually allowed for loading a car after it has been placed for him, or he consumes more than the usually allowed free time for unloading the car after it has been turned over to him for unloading. It is important to observe the foregoing usual significance of the word "demurrage" because it is in that sense that the term has been used in a great majority of the decisions and statements referred to by opposing counsel.

The term "reciprocal demurrage" is perhaps not the happiest expression and, as opposing counsel states, it may be a misnomer. A more suitable expression than "reciprocal demurrage law" would be "a law to compel carriers to furnish cars." The term "demurrage" standing alone does not ordinarily in the decisions include also the term "reciprocal demurrage," meaning a penalty imposed upon the carrier for failure to furnish cars within the free time allowed. This distinction is important. As we view the decisions, the great majority of the cases and opinions cited by opposing counsel in their brief have reference to demurrage charges rather than recipro-

cal demurrage charges, as above distinguished. For example, in Lehigh Valley R. Co. v. U. S., 188 Fed. Rep. 879, we read:

> "Thus we see that by the language of the (Interstate Commerce) act transportation is defined to include terminal charges. It must be conceded that demurrage, being a charge for the detention of a car because of the use of the car and track until unloaded, is a terminal charge."

This distinction will be brought out more fully hereafter.

The purpose of the act is very plain. Carriers having for years enforced a demurrage charge from the shipper, naturally the question arose with the shipper why the carrier should not be subject to a similar charge because of a delinquency on its part. While demurrage charges and reciprocal demurrage charges are dissimilar in their legal status, still the latter undoubtedly grew out of the former. The purpose, justice and beneficence of such a law is well expressed by the Mississippi court in the case of Yazoo v. Miss. Valley Ry. Co., 43 So. Rep. 605.

> "The purpose of all these charges is to benefit the public at large. On the one hand, the railroad commission, in imposing demurrage charges had in view the purpose of requiring cars to be unloaded by consignees with all reasonable dispatch and delivered back to the railroad companies that they might go again into the traffic business to haul other freight of other consignees; and, on the other hand, the object of the railroad commission in imposing reciprocal demurrage charges was to compel the railroad companies, conversely, with the same end in view, to move cars, when loaded, with all reasonable dispatch to consignees, in order that they

might, when unloaded, be promptly returned to the carrying of traffic of the country. The purpose was to keep in constant, rapid movement all the cars railroad companies have, the country over, in service everywhere, on their own lines and interchangeably on other lines, so that the traffic of the country should proceed expeditiously, and the things transported by freight cars all over the country be promptly everywhere delivered.

"In twenty states reciprocal demurrage measures are pending or have been enacted. Nearly all the organizations in the country representing large shippers have asked for reciprocal demurrage. It would correct many of the serious defects from which the country is now suffering. *The law of reciprocal demurrage is founded in the soundest common sense and in the highest spirit of equity.* If such laws are rigorously enforced, we will hear no longer of the freight congestion that has been so prevalent throughout the last winter, of thousands of empty cars standing unused in railroad yards in one section of the country, and coal famines in the other for want of cars. Reasonable reciprocal demurrage rates, fairly enacted and justly and impartially enforced, will result in a quickened traffic the country over, in a just recognition on the part of the railway corporations of the land of what they owe in prompt freight schedules and an abundant supply of cars to the public at large, and in an equally just recognition on the part of the public of their duty promptly to unload traffic borne to them in cars, and send such empties back to aid in further traffic."

The act seeks to protect the carrier as well as the shipper. It can only be invoked by those who apply for cars "in good faith" and it does not tolerate discrimination. (Sec. 1 of the Act.)

Minnesota was fortunate in the fact that when the Legislature of 1907 convened, the Supreme Court of the United States had already in the case of Houston T. C. R. Co. v. Mayes, 201 U. S. 321, expressed its views upon this subject. That case was before the legislature and it is common knowledge in Minnesota that the Senate Committee held meeting after meeting in which railway officials and attorneys, shippers, wholesalers and retailers, participated in their endeavor to frame a law which would be both just and constitutional. Our present law was the outcome.

Ex-attorney General E. T. Young of Minnesota in opinion 247 of his 1906 report says:

> "Nothing can be fairer than a reciprocal demurrage law."

**b. Such a statute is advocated by shippers, railroad commissioners, courts, legislatures, etc.**

Large shippers the whole country over have been urging such a law for years. This is common knowledge and needs no argument. They are the persons most directly benefited by the act.

That railroad commissioners have been advocating such a law is evidenced by the fact that it has been the subject of their discussions in national meetings during recent years. However much they may differ as to the validity of such state enactments, as to the beneficence of such a law, they seem to be almost unanimous.

That courts favor such a law will appear clearly from the decisions which are hereinafter given in this brief. This Court in the Mayes case says:

> "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers," etc.

More than one-half of the legislatures of the United States have passed similar statutes, either directly or by authorizing railroad commissions or similar bodies to establish such rules. It will be presumed that in doing this these legislatures acted with wisdom and not from mere caprice. Undoubtedly in each of these assemblies a fight was made similar to the fight made before the Minnesota Legislature prior to the passage of the Minnesota Act. The wisdom of such laws is best attested by their passage after such fiery trials as each of them was subjected to. Undoubtedly some unwise laws are passed by legislatures, but reciprocal demurrage laws escape condemnation when advocated and passed by such a large number of legislative assemblies composed of intelligent representatives of the people.

**c. The validity of such a statute is sustained by text book writers, railroad commissioners, the Interstate Commerce Commission, legislatures, attorney generals and courts.**

Watkins on Shippers and Carriers, Sec. 306.

> "Notwithstanding the fact that discrimination is prohibited by the interstate commerce act, it would seem that a state might make a reasonable regulation fixing the specific rules relating to furnishing cars upon demand. If such rules recognized the fact that carriers must furnish to all alike and allowed all reasonable excuses for failure to comply therewith, the rules would be valid."

Quotes from Mayes case and continues:

> "The Texas statute was held void as being an unreasonable regulation of interstate commerce."

Quotes further and continues:

> "Had the regulation allowed all proper excuses for failing to furnish cars, it would have been reasonable and, therefore, valid."

See also,

> Calvert—Regulation of Commerce. Preface, page 4 et seq.

Opposing counsel in their brief on pages 13-15 comment upon the discussion, relative to car service and demurrage, by the National Association of Railway Commissioners. While some of the railroad commissioners doubted the validity of state enactments along that line, it appears clearly that other commissioners believe that states in the exercise of their police power could make reasonable enactments relating to that subject. The sum total of their discussion was simply this: That they were divided on the question.

Counsel for appellant on page 13 of their brief quote from the report of Commissioner Lane, dated January 2, 1907. All of the observations of the Commissioner relative to car shortage was not quoted, for immediately following the quoted portion and the quotation from the Mayes case, Commissioner Lane says:

> "There is nothing in this decision (Mayes case) which justified the conclusion that a reciprocal demurrage bill or rule governing interstate commerce cannot be so drawn as to come within the ruling of the court and the principles declared in the opinion of the learned justice."

> "If the Interstate Commerce Commission is to be vested with power to make rules under which railroads shall be required upon penalty to furnish cars to shippers, this Commission should also be empowered to make rules under which free interchange of cars shall be effected, etc."

On page 12 of their brief opposing counsel quotes certain rules adopted by the Interstate Commerce Commission. It will be observed that those rules were adopted subsequent to the time when the cause of action arose in this suit, which was in the fall of 1907. Furthermore, the term "demurrage" as used in those rules embodies the limited definition of the word and is not broad enough to include the term "reciprocal demurrage" as hereinbefore defined. That would appear to be the construction placed by the Interstate Commerce Commission itself upon the rules, in the light of the quotation from Lane's report dated January 2, 1907, and in the light of the report of the Commission for 1906 on page 17, which is quoted hereafter. It will be observed that this report was made subsequent to the passage of the Hepburn Act.

That many legislatures believe in the validity of such state statutes follows from the presumption that the intention of the legislature is to enact a constitutional statute. State v. Canda, 85 Minn. 457 (460).

Opposing counsel in their brief quote Ex-Attorney General E. T. Young of Minnesota. It will be observed that the opinion in which he sustains the validity of a reciprocal demurrage bill was given in the discharge of his official duties while the quoted opinion wherein he denied the validity of such a bill was given to a private person. Nor do we concede the statement of

counsel that "the opinion of October 30, 1907, has been generally accepted as the law of Minnesota not only by the state authorities, but every Minnesota shipper so far as we know, except this defendant in error."

The fact is that the pendency of the case in bar is generally known and they are waiting the outcome of this suit so that they can proceed with certainty. While they have their opinions concerning the validity of this law, caution dictates a delay before acting. Nor can it be presumed that when so many states have passed similar statutes they would have done this if the attorneys general of those states had advised the legislatures that such acts would be invalid. The natural presumption is the other way, and that upon a question of doubt the legislatures have consulted the highest legal advisers of the states, and the advice has been favorable, in general, to the passage of such an act.

That a great majority of the courts entertained the view that such statutes are constitutional is apparent when we consider how many cases have been decided favorable to that view by the different courts throughout the United States. Extended comment upon this is made hereafter, but it is submitted that these decisions are more persuasive than the opinions of railroad commissioners, legislatures, attorneys general or other bodies or persons. While there are some dissenting views and decisions, the great majority of the courts sustain the constitutionality of such laws.

**d. Decisions of the United States Supreme Court.**

The leading case before this Court involving a reciprocal demurrage law is Houston & Texas Central Railway Company v. Mayes, 201 U. S. 321. This was an action begun by Mayes to recover a penalty of $475.00 by reason of the defendant's failure to furnish stock cars for interstate shipments and was made under a Texas statute,

> "the material requirement of which is that when the shipper of freight shall make a requisition in writing for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application, and shall deposit one-fourth of the freight with the agent of the company, the company failing to furnish them shall forfeit $25 per day for each car failed to be furnished, the only proviso being that the law 'shall not apply in cases of strikes or other public calamity.'"

The same defense was raised in that case as in the case of bar, namely: that the act did not apply to interstate shipments and the act was unconstitutional as an infringement upon the power of Congress to regulate interstate commerce. The Court says:

> "That, notwithstanding the exclusive nature of this power, the states may, in the exercise of their police power, make reasonable rules with regard to the methods of carrying on interstate business, the precautions that shall be used to avoid danger, the facilities for the comfort of passengers and the safety of freight carried, and, to a certain extent, the stations at which stoppages shall be made, is settled by repeated decisions of this court. Of course, such rules are inoperative if conflicting with regulations upon

the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce. As the power to build and operate railways, and to acquire land by condemnation, usually rests upon state authority, the legislatures may annex such conditions as they please with regard to intrastate transportation, and such other rules regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed.

"The exact limit of lawful legislation upon this subject cannot, in the nature of things, be defined. It can only be illustrated from decided cases, by applying the principles therein enunciated, determining from these whether, in the particular case, the rule be reasonable or otherwise.

"While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, acci-

dental fires, washouts, or other unavoidable consequences of heavy weather.

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

That was a close case, decided by a divided court. Three members dissented, one took no part and the rest agreed that the statute in question was "not far from the line of proper police regulation." The real gist of that decision was that the Texas statute was UNREASONABLE. The Minnesota statute is REASONABLE.

The main points of difference in the two statutes are as follows:

1. The Texas statute provided for a deposit of one-fourth of the freight charge at the time of making application; the Minnesota law provides that the application shall be made in good faith, which is equivalent to the Texas provision.

2. The Texas statute provided for a payment of $25 a day for delay; the Minnesota law, the nominal sum of $1 per day.

3. The Texas statute suspended the application thereof only "in case of strikes and other public calamity"; the Minnesota law allows suspension "on account of strikes, public calamities, accident, or any cause not within the power of the railroad company to prevent."

As to 2 and 3, a hasty examination is convincing that the Minnesota legislature sought especially to avoid the fatal errors of the Texas statute and made a REASONABLE statute. The railroads are given a wide latitude in avoiding the forfeiture provided for. The trial court for the purposes of the case in bar said (Transcript of Record, Fol. 31):

> "A sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary or unavoidable detention in other states or places, or accidents to rolling stock of the company, panics, are all within the meaning of the words 'accident, or some cause not within the power of the railroad company to prevent' as used in the statute that I have read you."

Under our statute exceptions are made which remove it from the condemnation of the Mayes case. Under our law, too, the trial court can always protect the railroads by defining the statutory phrases in the same manner as the trial court herein did, as applied to any case on trial.

St. Louis & Southwestern Ry. Co. v. Arkansas, 217 U. S. 136, was an action to impose a penalty on a

railroad company for its refusal to furnish cars to a shipper on demand. The Supreme Court of Arkansas decided that the only fault on the part of the railroad company, which led to its failure to furnish cars, was that the rules and regulations of the American Railway Association to which association the railway company belonged, were inefficient. The railroad company was powerless to change those rules and, therefore, was necessarily either compelled to desist from the interchange of cars with connecting carriers for the purpose of the movement of interstate commerce, or to conduct such business with the certainty of being subjected to the penalty which the state statute provided for. This Court was bound to adopt the construction of the Arkansas Supreme Court upon the Arkansas statute. The Arkansas Supreme Court held that the excuse as stated above for its failure to furnish cars was not a good defense under the Arkansas statute. This construction of the Arkansas statute made it unreasonable, and necessarily made that statute a burden upon interstate commerce, and for these reasons this Court held the statute unconstitutional. If the Arkansas Court, by its construction of the statute, had allowed the railway company to set up as a defense, the rules and regulations adopted for the interchange of cars by the American Railway Association, then in all likelihood this Court would have held the Arkansas statute a reasonable one, not a burden upon interstate commerce, and hence constitutional. The Minnesota statute is so broad in its terms that in an action begun

under it, the said rules and regulations could have been pleaded as a valid defense.

New Mexico v. Denver & Rio Grande Railroad Company, 203 U. S. 38, was an action involving the constitutionality of an act passed by the Territory of New Mexico making a prohibition against the receipt by common carriers for transportation beyond the limits of the territory of hides which do not bear the evidence of inspection required by the act. This act was held to be a valid exercise of the police power. The Court said:

> "The question principally argued is as to the effect of this law upon interstate commerce, and it is urged that it is in violation of the Constitution, because it undertakes to regulate interstate commerce, and lays upon it a tax not within the power of the local legislature to exact. It has been too frequently decided by this court to require the restatement of the decisions, that the exclusive power to regulate interstate commerce is vested by the Constitution in Congress, and that other laws which undertake to regulate such commerce or impose burdens upon it are invalid. This doctrine has been reaffirmed and announced in cases decided as recently as the last term of this court. Houston & T. C. R. Co. v. Mayes, 201 U. S. 321; McNeill v. Southern R. Co., 202 U. S. 543. While this is true, it is equally well settled that a state or a territory, for the same reasons, in the exercise of the police power, may make rules and regulations not conflicting with the legislation of Congress upon the same subject, and not amounting to regulations of interstate commerce. It will only be necessary to refer to a few of the many cases decided in this court holding valid enactment of legislatures having for their object the protection, welfare, and safety of the people, although such laws may have an

effect upon interstate commerce. Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613-635; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133; Pennsylvania R. Co. v. Hughes, 191 U. S. 477. The principle decided in these cases is that a state or territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce."

Cleveland C. C. & St. L. Ry. Co. v. Illinois, 177 U. S. 514, we find:

"Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good."

The Court then cites a number of cases where the foregoing doctrine was applied, and says:

"In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce.

"But for the reason that these laws were considered unreasonable and to unnecessarily hamper commerce between the states, we have felt ourselves constrained in a large number of cases

> to express our disapproval of such as provided for taxing directly or indirectly the carrying on or the profits of interstate commerce."
>
> See Ry. v. Jacobson, 179 U. S. 287.

In Chicago, R. I. & P. Co. v. Arkansas, 219 U. S. 453, a state statute prescribing a minimum crew, to consist of an engineer, a fireman, a conductor, and three brakemen, for all freight trains of more than twenty-five cars, operated in the state, was held not an unconstitutional regulation of interstate commerce, although applicable to interstate trains, the court saying:

> "The statute here involved is not, in any proper sense, a regulation of interstate commerce, nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce, and for the protection of those engaged in such commerce. Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power, and not germane to the objects which evidently the state legislature had in view. It is a means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object."

See also,

> Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613.
>
> Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580.

**e. Decisions of State Courts.**

The case of Southern Railway Company v. Virginia, 107 Va. 771, is instructive and shows the interpretation, effect and meaning of the Mayes case to that court. It was decided on January 23, 1908, subsequent to any congressional action which might have been claimed as bearing on the subject. That was a case imposing a penalty upon a railway company for failure to furnish cars and was held an invalid interference with interstate commerce because unreasonable and because it "was absolute in its requirements." The court, however, said:

> "There is nothing in the opinion of the court in the Texas case which denies the right of a state to prescribe a *reasonable* rule or regulation of transportation companies and shippers in the matter of furnishing and loading cars for interstate as well as intrastate shipments of freight, provided the rule or regulation be reasonable and just, and does not in its application directly infringe upon the commerce clause of the Constitution of the United States, or violate some right of such companies or shippers protected by that instrument; but the Texas statute is declared invalid upon the ground that it was unreasonable, in that exceptions were not made for cases which might occur rendering the carrier unable to furnish cars within the time specified, thereby imposing an unreasonable burden upon interstate commerce.
>
> "I desire to emphasize the fact that I am of the opinion that it is within the competency of the State Corporation Commission, in the absence of legislation by Congress or action by the Interstate Commerce Commission, to establish and enforce reasonable rules and regulations requir-

ing railroad companies, upon application of intending shippers, to supply adequate car service, whether the freight be intended for intrastate or interstate shipments; and that, in the present state of the decisions of the Supreme Court of the United States on the subject of interstate shipments (the controlling influence of which is conceded), the crucial test of the validity of such rule is its reasonableness. (concurring opinion.)

"We base our conclusions in the case upon the principles announced and the reasons given in the Mayes case, which clearly recognizes, as we understand it, the right of the state, under its police or reserved powers, to make reasonable regulations as to the furnishing of cars by railroad companies, not only for intrastate, but also for interstate shipments." (Concurring opinion.)

In Oliver and Son v. Ry. Co., 117 S. W. 328, the Arkansas court holds a law imposing a penalty of $5.00 a day and making the requirement to furnish cars absolute and unconditional, good as to intrastate shipments and purposely refrains from any opinion as to whether the law is valid as to interstate shipments.

Patterson v. Ry. Co. 77 Kan. 236, 94 Pac. 138, is strictly in point and a very well considered case. The Mayes case was discussed. It states that such a law is an *aid* to commerce instead of a *burden*. The provisions of the Kansas statute are similar to ours. $1 a day penalty is provided and suspension is allowed on account of "strikes, unavoidable accidents and other public calamities."

Southern Ry. Co. v. Atlanta Sand & Supply Co., 68 S. E. 807 (Ga.), was decided by the Supreme Court

of Georgia on August 11, 1910. This was an action brought to recover damages for failure on the part of the railroad company to furnish cars, and involved interstate shipments. It was brought under Storage Rule 9 of the Railroad Commission of Georgia, adopted under authority of the Act of 1905. Said rule is as follows:

> "Railroad companies are required to furnish cars promptly upon request therefor. When a shipper files with a railroad company written application for a car or cars, stating therein the character of freight to be shipped, and its destination, such railroad company shall furnish same within four days (Sundays and legal holidays excepted) from seven o'clock a. m. of the day following the receipt of such application. For a violation of this rule the railroad company at fault shall, within thirty days after demand in writing is made therefor, pay to the shipper so offended the sum of one dollar per car per day, or fraction of a day, after expiration of free time, during which such violation continues."

The Supreme Court then discusses the police power of the state and the federal power to legislate on the subject of interstate commerce, and proceeds:

> "Other instances might be mentioned, some of which will be found referred to in the cases above cited. It will thus appear that it is a mistaken conception to suppose that wherever a railroad engages in interstate shipments, the Constitution of the United States by its own force in all respects inhibits the police power of the state from dealing with such railroad. As to matters relating to interstate commerce which essentially and exclusively appertain to the federal government the power of the states to directly regulate them may be inhibited; but there is a large class of subjects which may be dealt with under the police

power of the individual states, although its exercise may touch instrumentalities of interstate commerce, and indirectly to some extent affect such commerce. No catalogue can be made setting forth exactly what falls within the one class or the other. But the fact that a distinction between the two exists is well established.

"In regard to the subject of statutes or rules of Railroad or Corporation Commissions of states, requiring the furnishing of cars, and providing for a penalty or amount which may be recovered for failure to so furnish them in accordance with the requirements made, and the application of such enactments or rules to cases where cars are desired for use in interstate shipments, the decisions are not many, but they vary widely in the views which they express. They may be grouped about the case of Houston & Texas Central Railroad Co. v. Mayes, 201 U. S. 321."

The court then quotes quite fully from the Mayes case. Then it takes up and discusses the St. Louis Southwestern Ry. Co. v. State, 85 Ark. 311, a case which was carried to the Supreme Court of the United States where it was decided April 4, 1910, (207 U. S. 136), and then goes on and says:

"We have quoted at some length from these two recent decisions of the Supreme Court of the United States, in order to show that in neither of them was it declared that a state Legislature, or a Railroad Commission under its authority, could not make a rule requiring cars to be furnished within a reasonable time, although they were to be used for interstate shipments, unless such rule or act excluded legitimate defenses. To say that all of the discussion in the Mayes case, which has been set out above, meant merely to declare that the states could not make such rules, regardless of the defenses permissible in suits brought thereunder, would be to attribute

to that high court the employment of a large amount of needless circumlocution, and of basing its opinion upon the illegal restriction of defenses made by the Texas statute, when in fact the extent of the defenses allowed thereby had nothing to do with the case. We cannot suppose this to be the fact in regard to a decision of that great court. And while the decision in the case of St. Louis Southwestern Ry. Co. did not refer to the Mayes case or deal as specifically with the limitation of defenses under the state statute, the analysis of the decision of the state court and the conclusion drawn therefrom apparently proceed on the ground of the exclusion of a lawful defense, and not upon the ground that the state could enact no such law in any event. Nor do we think that this position is altered by the last sentence in the opinion, which reads as follows: 'In the nature of things, as the rules and regulations of the association concern matters of interstate commerce inherently within federal control, the power to determine their sufficiency we think was primarily vested in the body upon whom Congress has conferred authority in that regard.'

"As already indicated, the line of demarcation between the authority of Congress and that of state Legislatures is not one which has been defined with mathematical exactness. It has rather been determined as a concrete question on which side of the line a particular case fell. As the Supreme Court of the United States have mentioned reasonableness as a guide in determining the extent to which a state law may affect interstate shipments without being invalid, and as reasonableness or unreasonableness is a matter for which no absolute standard can be prescribed, but a thing sometimes appears reasonable to one mind, yet unreasonable to another, and even the same person may change his views as to what is reasonable with age, experience, and reflection, the determination of questions like that

now before us involves no small difficulty. We believe, however, that the effect of the rulings above mentioned is that the states are not absolutely precluded from making rules of the character of that here involved, either as to cars to be used in intrastate shipments, or those to be used in interstate shipments; but that the exclusion of proper defenses as to cars to be used in interstate shipments would render the act or rule effectual as to that class of business.

"Nor do we now hold, that the act of 1905 or the rule of the Railroad Commission constituted a regulation of interstate commerce in any such sense as to be obnoxious to the Constitution of the United States, or to acts of Congress authorized thereby. Nor do we think that Congress has specifically dealt with the matter covered by the act of the Legislature and the rule of the Commission, so as to render them ineffective in respect to cars to be used in shipping goods to another state. In our opinion neither the provision in section 3 of the act of Congress, entitled, 'An act to regulate commerce' (Act Feb. 4, 1887, c. 104, 24 Stat. 379, U. S. Comp. St. 1901, p. 3154), which declares it to be unlawful for any common carrier subject to the provisions of the act 'to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, or locality, or any particular description of traffic, in any respect whatsoever,' etc., nor section 23, which authorizes the circuit and district courts of the United States to issue writs of mandamus in certain cases, is such a specific dealing with the matter covered by the act of 1905 and rule 9 of the Railroad Commission as to render them invalid in respect to applications for cars intended to be used in shipments to points beyond the limits of the state. Mandamus is a remedy which does not exclude other statutory rights to sue for penalties or common-law rights to sue for damages. We have not had brought to our attention any act of Congress of

such a character as to exclude the exercise of the police power of the state."

It then concludes that the foregoing rule is applicable to interstate shipments; that it is not an unlawful interference with interstate commerce; that under it the railroad company may plead and prove sufficient excuse or cause for non-compliance, and that the rule is a reasonable one.

Martin v. Railway Company, 113 Pac. Rep. 16 (Ore.), was decided December 27, 1910, and involved interstate shipments of fruit in the fall of 1907. (The same time when the shipments involved in the case at bar took place). The action was predicated on section 26 of the railroad commission law, which, it was asserted by the railroad company, was not applicable to such transactions and, if so applied and made to operate, constituted a regulation of, and an unlawful and unwarranted interference with, interstate commerce. Said section 26 provided, in substance and briefly stated, that a railroad company should furnish cars when applications therefor were made by shippers. The court said:

"Without deciding, but conceding for the purpose of this case, that the contemplated transactions heretofore detailed constitute interstate commerce, that alone will not render void the provisions of the act above quoted, if applied to them as we think it should be. Notwithstanding the exclusive nature of the power to regulate interstate commerce vested in the federal government, it has repeatedly been held by the Supreme Court of the United States that the respective states may, in the exercise of their police power, make reasonable rules with regard to the meth-

> ods of carrying on interstate business. But such rules are inoperative only when in conflict with regulations upon the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amount to a regulation of such commerce."

The court then goes on and discusse sthe Mayes case and says that the Texas statute was held void not because the state could not under its police power prescribe reasonable rules and regulations as to furnishing cars by a railroad company, when the shipment contemplated would constitute interstate commerce, but because there was an absolute requirement by that statute that a railroad should furnish a certain number of cars at a specified date regardless of every other consideration, except strikes and other public calamities.

> "The features of the Texas statute, rendering it unreasonable, as pointed out by the court, were that no exception was made in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places in the same state; that there was no allowance for interference of traffic, occasioned by wrecks or other accidents upon the same or other roads, involving a detention thereof, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather. Allowance for all these contingencies is made in our statute, unless it is in the one particular of a sudden congestion of traffic, the absence of which in the Texas statute caused it to be declared arbitrary and burdensome to interstate commerce. The lower court, however, construed the word 'accident' used in the stat-

> ute, to be sufficiently broad to cover the contingency of traffic congestion, and defendant had the benefit of his defense on that ground, and is therefore not in a position as to that to complain."

(The trial court in the case at bar also submitted to the jury every defense which was asserted by the railroad company, giving a broad interpretation to the word "accident" found in the Minnesota statute.) It was further urged in the Oregon case that Congress had legislated upon the subject, and, therefore, that the state statute was thereby superseded. The court discusses that matter as follows:

> "In defendant's brief it is pointed out that Congress has legislated upon the same subject, and therefore it is argued that the state statute is superseded. This does not follow, unless the provisions of the two laws so conflict that they cannot stand together. It was said in Sinnot v. Davenport, 22 How. 227, 243 (16 L. Ed. 243), that, 'In the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' And in Reid v. Colorado, 187 U. S. 137, 148, 23 Sup. Ct. 92, 96 (47 L. Ed. 108), that court again said: 'It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police power of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.' The same principle was announced in Houston & Texas Cent. R. Co. v. Mayes, supra. By the congressional act of June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), amendatory of and supplemental to the act of Feb. 4, 1887, c.

104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), known as the interstate commerce law, the term 'transportation' therein was declared to include cars, and it was provided that, 'it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor,' etc. By section 8 of the original act, the carrier omitting to do any act or thing required to be done is liable to the person injured thereby for the full amount of damages sustained, together with a reasonable attorney's fees, to be fixed by the court in case of recovery. We see no conflict between that legislation and the provisions of the state law, nor do we see any intent to exclude or supersede the state statute in regulating the furnishing of cars. Indeed, it can hardly be said that the federal act attempts to regulate that matter. It declares the primal duty to furnish cars upon reasonable request therefor, and stops with that. The penalty for a dereliction of that duty is damages suffered and reasonable attorney's fees. So far the two acts, federal and state, are identical, but the state law goes further. It regulates the manner of making the request, the time within which cars shall be furnished, the excuses that may be made for a failure to deliver cars, and adds an additional penalty by way of demurrage for a failure to comply with the terms of the statute. This statute, therefore, covers a field not occupied by the federal statute, and the principles announced in Reid v. Colorado, supra, are applicable to the facts of this case."

Chicago, R. I. & P. Ry. Co. v. Beatty, 118 Pac. Rep. 367 (Oklahoma), was decided October 10, 1911, and was an action brought to recover a penalty of $1.00 per day per car against the railroad company for not supplying cars for an interstate shipment of freight in November and December, 1906. The question involved was the constitutionality of an Oklahoma act

of the legislature which imposed upon railroad companies a penalty of $1.00 per day for failure to furnish cars within four days after they were requested, but excusing a company "in case of fire, washout, strikes, lockouts, or other unavoidable casualties." The court says:

> "The inquiry, therefore, is whether this statute regulates interstate commerce, or whether it is a mere exercise of the state's police power; whether its design is to obstruct interstate commerce, or merely to facilitate the movement of freight, both inter and intrastate.
>
> "It sems clear to us that the purpose of the statute is the latter, and not the former. The prompt movement of the cars for interstate commerce cannot be a burden upon it, but an aid to it; and, if this statute affects interstate commerce, it is merely incidental and in aid of it."

The court goes on to discuss several cases involving similar statutes, and also the Mayes case, and concludes:

> "Under the authority of the Mayes case, therefore, as well as all the other decisions on the subject, the subject-matter of this statute is rightfully within the power of the Legislature, and in order for the courts to strike it down we must be able to say that it is so arbitrary and unreasonable as to transcend the limits of the state's power. We cannot reach this conclusion."

Counsel for plaintiff in error contend that this decision is in conflict with the prior decision of the Oklahoma court in the case entitled "St. L. & S. F. R. R. Co. v. Oklahoma, 26 Okla. 62." We can see no such conflict because the prior case did not involve any

statute or rule imposing a penalty for delay in the furnishing of cars, but involved a rule which attempted to allow certain consignees ten days free storage on less than carload shipments. That attempted to lay down a rule applicable after the shipment had begun and while the transaction was still one of interstate commerce. The Oklahoma court, likewise, evidently saw no variance in the two cases for in the latter case absolutely no mention was made of the former one. Naturally, if they saw any variance, they would attempt to explain the same or distinguish the cases.

**f. Congress has not legislated on the subject, nor has the Interstate Commerce Commission been vested with power in the premises.**

Congress has not legislated upon this subject. The sole object and purpose of the Interstate Commerce Act, as amended by the railroad rate act of June 29, 1906, was to make discriminations unlawful, and to provide that "all charges made for any service rendered or to be rendered in the transportation of passengers or property aforesaid, or in connection therewith shall be just and reasonable." This is something separate and apart from the purposes and objects of the Minnesota Act. In fact the enforcement of damages for failure to furnish cars would operate to further the purposes of the Interstate Commerce Act. It would tend to destroy discrimination as railroads would be more zealous to furnish cars to ALL. The

demands of the public GENERALLY would be satisfied.

Am. & Eng. Ency. Law, Vol. 17, p. 103.

That these are the purposes of the Interstate Commerce Act is shown by Southern Ry. Co. v. Reid, decided in this Court, January 9, 1912:

> "The provisions of the act are directed at the abuses most to be feared,—unreasonableness in the rates, and discriminations, including in the latter discriminations in service, in the acceptance and delivery of freight, and in facilities furnished.
>
> "By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application."

The Hepburn Act took effect January 29, 1906. It was passed to remedy certain deficiencies found to exist in the previous Act. However, in so far as it relates to the case at bar it is not broader than the original Act. The word "transportation" probably included as much under the old Act as under the Hepburn Act, although not defined with so much detail. For the purpose of convenience a portion of Section 1 of the Act of 1887 relating to this case is set out herewith:

> "The term 'transportation' shall include all instrumentalities of shipment or carriage. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and

> just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

The Atlanta Sand and Supply Company case, the Martin case, and the Beatty case, portions of which are quoted under c, above, all were decided subsequent to the Hepburn Act, and each of them expressly hold that Congress has not legislated in the field relating to the furnishing of cars and that the respective state statutes are not in conflict with any congressional legislation, although, undoubtedly, the same point was urged in the respective state Supreme Courts as is urged here, to-wit: That Congress has legislated, and hence the state statute is superseded. In several instances the Interstate Commerce Commission has expressly disaffirmed that it has jurisdiction over this subject and in several cases brought before it has expressly refused for that reason to proceed, and has judicially held in effect that the Interstate Commerce Act, as amended by the Hepburn Act, does not cover the subject in question. In its report for 1906 on page 17 we read:

> "It is scarcely necessary to point out that the Commission is without authority under any existing law to deal effectively with this condition (Car shortage). Broadly speaking, the regulating power of Congress has not been exercised to control the physical operations of interstate railroads—aside from the safety appliance requirements—either as respects the movements of trains or the supply of equipment. It is true that the recent amendments include a very broad definition of 'Transportation' and impose in general the obligation to provide all needful facilities, but this is perhaps not much more than a

statement of common law obligations which already existed."

The National Association of Railway Commissioners appointed a committee on Car Service and Demurrage which made a report to the Association at its annual convention held in November, 1909. The majority report, speaking through Mr. Lane of the Interstate Commerce Commission, declined to consider reciprocal demurrage in its report and gave several reasons for so doing, among them being:

1. That the committee was not a unit as to the desirability or practicability of reciprocal demurrage.

2. "This committee was directed by the association to frame a demurrage code—that is, a code or schedule of the charges made by the carriers for the use of cars, together with the rules and regulations which determine the application of the charge. Reciprocal demurrage rules do not relate to the carriers' charge; properly speaking they are not demurrage rules, but *laws*, (italicized in report) enacted with a view to insuring complete fulfillment of the carriers' public obligations. So understood it seems clear that reciprocal demurrage is not within the scope of the authority conferred upon us. For these, among other reasons, the committee decided unanimously to confine its attention to the question of demurrage proper. In order to guard against misapprehension, we take occasion to say that our action is not to be construed as having any bearing upon the merits of reciprocal demurrage; the adoption of the proposed rules would be in no wise inconsistent with legislation imposing penalties upon carriers for their delinquencies. We decide only that that question is independent of the work in hand."

Mason v. C. R. I. & P. Ry. Co., 12 I. C. C. 61, was decided on March 25, 1907. The Commission there stated:

> "Complainant's counsel appeared at Cedar Rapids and stated that unless the Commission had authority to fix rules governing the furnishing of cars and demurrage thereon there was no desire to continue the case simply for the recovery of the small amount of damages claimed. Statement was thereupon made THAT THE COMMISSION HAD NO AUTHORITY TO FIX RULES AND REGULATIONS GOVERNING RECIPROCAL DEMURRAGE, and complaint was withdrawn." (The capitals are ours.)

Reference is again made here to the portions of Commissioner Lane's report, which are quoted under c, above. The Commission even holds that the Interstate Commerce Act contains no provision which even impliedly gives the Commission jurisdiction in cases of this kind.

We find in Richmond Elevator Company v. Railway, 10 I. C. C. 629:

> "The Act to regulate commerce contains no provision which expressly or by proper implication gives this Commission jurisdiction in cases merely showing delay or negligence in the receipt, forwarding or delivery of property offered for transportation, and this necessarily includes failure on the part of the carrier to furnish cars for the movement of freight within a reasonable time."

While this action may have been commenced in July, 1908, the cause of action accrued in the fall of 1907. This was before the Interstate Commerce Commission had promulgated any rules even as regards

"demurrage charges," although we contend that "demurrage charges" do not include "reciprocal demurrage charges," and hence any action on the part of the Commission subsequent to the accrual of the cause of action involved in this case has no bearing upon the determination of this case, even though it be conceded that the Commission had power to make the rules and regulations, and that those rules and regulations covered the subject herein involved. No claim is made by the plaintiff in error that the Interstate Commerce Commission had appropriated to itself any such power or made any such rules prior to May 12, 1908.

### g. Other cases distinguished.

Counsel for plaintiff in error has called this court's attention to certain cases. As we view them, they are not in point, and it is the purpose of this subdivision to distinguish them from the case at bar.

In Texas & Pacific Ry. Co. v. Abelene Cotton Oil Co., 204 U. S. 426, it was held a shipper could not maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment without reference to any previous action by the Interstate Commerce Commission where the rate had been filed with that Commission, as provided by the Act. The Interstate Commerce Act expressly legislated upon the question of freight rates, and hence the procedure contemplated by that Act was exclusive.

Union Pacific Ry. Co. v. Updike Grain Co., decided in the United States Supreme Court December 4, 1911, was an action brought by elevator owners to recover from the carrier compensation for elevator service. The court held that they were entitled to this compensation in view of the provisions of the Act of 1906, which recognized that services in transportation rendered by an owner of the property transported are to be paid for by the carrier. Elevation was held to be a part of the transportation in view of the language contained in the act, to-wit:

> "Transportation shall include * * * all * * * facilities of shipment. * * * irrespective of ownership, * * * and all services in connection with the * * * elevation and transfer in transit * * * and handling of property transported. Carriers were required 'to provide and furnish such transportation upon reasonable request therefor.'"

The service there involved was one which took place AFTER the commodity had actually entered into commerce.

In Baltimore & Ohio Ry. Co. v. Pitcairn Coal Co., 215 U. S. 481, were involved certain rules for the distribution of coal cars adopted by the railroad company. These were alleged to violate the Interstate Commerce Act prohibiting unjust preferences and undue discriminations. It is very apparent that these regulations were in direct conflict with those covered by the Interstate Commerce Act, and that hence Congress had affirmatively acted on the subject-matter, and that hence relief was primarily within the ad-

ministrative competency of the Interstate Commerce Commission.

In Peale, P. & K. v. Ry., 18 I. C. C. 25, demurrage charges were involved, but these were charges which took place after the commodity had actually entered into commerce, and demurrage charges as thus involved were different from reciprocal demurrage charges. Nor does the Commission hold in that decision that reciprocal demurrage charges have the same legal status as demurrage charges.

In Wilson Produce Co. v. Ry. Co., 14 I. C. C. 170, track storage charges on carload shipments received at Pittsburg were involved. It was claimed that these were unreasonable and unjust. A Pennsylvania statute was held invalid because Congress had legislated on this subject. The same difference exists here, to-wit: That these charges were charges subsequent to the origin of the shipment and were expressly covered by the Interstate Commerce Act. Likewise, a similar observation can be made as regards Michie v. Ry. Co., 151 Fed. Rep. 694, and Lehigh Valley Ry. Co. v. U. S., 188 Fed. Rep. 879. In both of them charges subsequent to the origin of shipment were involved.

Southern Ry. Co. v. Reid, decided in the United States Supreme Court January 9, 1912, was an action started in North Carolina to enforce a state statute penalizing the refusal of a carrier to accept a tender of an interstate shipment. The question in the case was the validity of an act of the State of North Caro-

lina which required the agents and officers of railroads and other transportation companies to receive freight for transportation whenever tendered at a regular station and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding and forward the same by a route selected by the person tendering the same, under penalty of forfeiting $50 a day to the aggrieved party for each day of refusal to receive such freight and all damages actually sustained. In that case, in the month of September, 1907, Reid tendered to the railway company at Charlotte, North Carolina, certain goods for transportation to Davis, West Virginia, Davis being upon a different railroad from the Southern Railway Company. She offered to pay the freight charges and demanded a bill of lading. The railway company declined to name a rate to be charged for the transportation of the goods, declined to permit her to pay the freight charges, and declined to receive the goods for shipment and to issue a bill of lading. At that time no through and joint rate of freight had been established by the two interested railway companies and no rates had been filed with the Interstate Commerce Commission covering shipments between the two points. This was the reason the railway company made the refusal which it did. Shortly afterwards a rate was made, and thereupon the company complied with requests of Reid. The court said:

> "It hardly needs to be stated that transportation of property between the states is interstate commerce, and may be of Federal rather than of state jurisdiction. We say maybe of Federal jurisdiction, for interstate commerce in its prac-

tical conduct has many incidents having varying degrees of connection with it and effect upon it over which the state may have some power. As to the extent of the power and the occasions for its exercise, controversies have arisen, and in deciding which the power of the state over the general subject of commerce has been divided into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the state cannot act at all.

"There are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those engaged in interstate commerce. Such exercise of power it was further said, was in aid of interstate commerce, and, although incidentally affecting it, did not burden it. But the facts of those cases distinguish them from the case at bar, and make their principle inapplicable."

The court said that the case was determined by a determination of whether the Interstate Commerce Commission or Congress in the Interstate Commerce Act had acted. It stated that there was no contention that the Interstate Commerce Commission had acted, but this Court held that Congress had taken possession of the field, reasoning as follows: The Interstate Commerce Act required schedules of rates to be esablished and published and prohibited a departure from the rates so established, and prohibited any carrier from engaging in the transportation of passengers or property unless such rates had been filed and published. Congress thereby took control of the sub-

ject of rate-making and charging. The act, therefore, prohibited the agent of the railway company from accepting any goods for shipment from Reid because no rate had been established and filed, and hence the North Carolina statute conflicted with this act, and inasmuch as Congress had affirmatively acted in the matter, the North Carolina statute was invalid. It will be noticed that the only reason that the North Carolina statute was held invalid was because Congress had acted affirmatively upon the very matter set forth in the North Carolina statute. That case, therefore, is different from the case in bar because there is nothing in the act of Congress fixing or establishing reciprocal demurrage charges as distinguished from demurrage charges. Congress has not acted, and hence the statute will stand until Congress has taken possession of this field.

None of the foregoing cases mentioned in this subdivision involve reciprocal demurrage charges.

In the case of St. L. & I. M. Ry. Co. v. Hampton, 162 Fed. Rep. 693, no reason is given by the court for its holding. It tersely and peremptorily holds the Arkansas law void. It is of little value because it displays but slight consideration of the subject.

h. Minnesota Act does not burden commerce.

Argument upon this phase of the law would seem to be unnecessary, in view of the numerous and almost unanimous statements appearing in the decisions, hereinbefore commented upon, to the effect that a reasonable reciprocal demurrage law would be an aid

instead of a burden upon commerce and that it would simply compel railway companies to more diligently discharge their common law obligations. There can be no serious controversies as to the reasonableness of the Minnesota Act. It should be construed so as to accord and not be in opposition to what is said in the Mayes case. It can only be invoked by those making applications for cars in good faith. $1 a day is certainly a reasonable penalty and it is the sum which has been exacted by railroad companies for years, and it has become recognized as a proper and just amount. Every reasonable excuse is allowed the railroad company for failure to furnish cars. At all times the carriers can be protected by the courts from any impositions and can always be allowed the right to plead any proper excuses. The courts can always give a broad interpretation to the Minnesota statute, just as the trial court did in this case, making it fit the peculiar situation involved in each trial.

Counsel for plaintiff in error says:

> "Congestion, extraordinary demands upon equipment, unexpected volume of business, though of short duration, are not recognized as excuses under the Minnesota statute. It must be something like a strike, a public calamity or an accident, or meaning, under familiar rules, a similar cause not within the power of the railway company to prevent. Because it is within the power of the railway company to prevent a delay on account of an unexpected demand, it would, doubtless, be argued that it was within the power of the railway company to keep enough equipment in Minnesota to satisfy all demands, though out of proportion to that reserved for shippers in other states."

This is not true, for the Supreme Court of Minnesota construed the statute otherwise, and that construction is conclusive here. See opinion of the court shown on pages 30 and 31 of the Transcript of Record:

> "Construing the clause as a whole, we conclude that the enumerated defenses extend to any cause beyond the power of the railroad company to reasonably prevent. It includes as excepted cases all the contingencies recognized by the Texas statute involved in Houston, etc., Ry. Co. v. Mayes, 26 S. C. Ry. 491 (Post), all those set forth in that opinion for failure to except which that statute was there held invalid, the defense here asserted and others of the same kind. Thus it includes the objection by one of the defendants in another similar action that the statute entirely disregarded the quantity of freight to be loaded upon car or cars, the number of cars an dthe side track facilities which the particular shipper may have to handle whereby the carrier might be unjustly deprived of the use of its surplus cars required to be furnished above those which can be used. If, however, the facts in such case should show that it was unreasonable to charge demurrage, the carrier would have a complete defense; if the facts should show that it was reasonable to impose the charge the carrier would have no just ground of complaint."

It is unnecessary to go into the evidence in this case. Furthermore, only an abstract of the evidence is set forth. However, it may not be improper to state that the evidence given at the trial of this case did not disclose what counsel for plaintiff in error claims it did on page 46 of his brief. A great many of the statements did not appear at all in the testimony, and as to them, the record is absolutely silent. As to a great many other assertions, they were the mere legal

conclusions of one of the witnesses for the railroad company, who displayed unusual anxiety to make out a strong case for his employer and whose story was for the jury to weigh and consider. A fair deduction from the testimony of this same witness was: that the appellant, in the fall of 1907 and for several years prior thereto, was booming the southwest territory (Texas and Oklahoma principally) at the expense of the northwest territory (the Dakotas, Minnesota, Iowa and Nebraska); that, instead of doing its plain duty of furnishing cars to all without discrimination, it was rushing its main equipment into the southwest, advancing its own enormous real estate holdings there, and purposely diverting grain and other commodities from Chicago, Milwaukee and other northern cities, hitherto the natural outlets, to Galveston and other Gulf cities. This case and principally the story of this witness disclosed a splendid illustration of the power of railroads to make or ruin cities and communities, a power dangerous to this nation and which has demanded and continues to demand the closest attention of our statesmen. The appellant purposely departed from its plain and single duty as a common carrier and became an advocate of the southwest. When the panic of 1907 came on and there was consequently a slump in prices, as is well known, the defendant in error, by reason of appellant's failure to furnish cars, was caught with its elevator full of grain, which had to be sold for approximately one-half its cost. The verdict is but small compensation for its actual loss. This is not

in any sense "a discussion of the evidence," but reference is made to it simply to show the other side of the picture and the necessity and wisdom of the Minnesota statute.

### i. The Minnesota decision in this case.

This court's particular attention is called to the decision of the Minnesota Supreme Court from which this writ of error is taken. It will be found on pages 26-35 of the Transcript of Record. That decision was the final edict of the Minnesota courts relating to the constitutionality of this law which, before its argument in the Supreme Court, had its constitutionality passed upon at three distinct times by the Trial Court, and upon the first and last of those occasions the matter was argued very exhaustively by counsel. We believe this decision written by the late Mr. Justice Jaggard to be a well-considered, clearly written, exhaustive and incontrovertible defense of the constitutionality of the Act. Other cases involving the validity of the same law were submitted at the same time, and hence the Minnesota court had the benefit of counsel representing at least three plaintiffs and at least three railway defendants.

The Minnesota court construes the law to apply to interstate as well as intrastate commerce; it gives a broad interpretation to Section 11, which enumerates the instances in which the period during which the furnishing of cars is suspended, making the same include all the contingencies involved in the Mayes case; it discusses the different classes of cases where-

in the states in the exercise of their police power may legislate, and wherein the federal government in the exercise of the power granted it by the Constitution may legislate; it holds that the law conflicts with no congressional action previously taken or reasonably presumed, speaking particularly of the Interstate Commerce Act, as amended by the Hepburn Law; it considers the law as an aid to commerce and reasonable in its provisions; it holds that the law is sustained by the authorities and discusses them, especially the Mayes case; and it dwells upon the wisdom of state legislation upon this subject. This last mentioned matter is such a complete answer to the argument of opposing counsel on this phase of the question that we quote as follows:

> "There are obvious practical advantages in permitting the states to legislate on this subject. So to do secures the flexibility of local legislation and the certain conformity with Federal standard. In the nature of things the legislatures of the various states are peculiarly familiar with and in an especially good position to determine the expedience of such a law in the geographical and commercial situation presented, with due reference to the density of population, nearness to markets, the productiveness of the region, the perishability of products, climatic conditions, the nature and extent of actual railroad facilities, the difficulties of movement, the variation in demand and with due reference to many other facts involved in the problem of transportation. Consistent determination of the legal aspects of such a law is certainly secured because the ultimate decisions of all essential questions arising under it rest not with the courts of the various states, but with the highest Federal tribunal. It appears probable that uniform Congressional legislation would lack the

flexibility and adaptability of local laws. 'The failure of the states to adopt regulations to meet a supposed need, either by indifference to the wrong or delinquency or by such an exercise of the power that, on account of the absolute requirements imposed, a regulation cannot pass the supreme test of reasonableness, results in agitation for federal regulation of matters concerning which the power of Congress is undoubted. There would be no need to invoke the exercise of the federal power in such cases if states adopted reasonable regulations to satisfy local requirements of opinion.' Calvert on Regulation of Commerce IV. It is certain that if the determination of legal issues was left to the state courts there would be variety and confusion in decision. The present system is capable of proving an advantage both to the carrier and shipper."

## CONCLUSION.

Believing as we do that the Minnesota Law is a wise one and beneficial to the shippers of Minnesota, especially the small shippers, and believing further that the Act is reasonable in its provisions and does not violate any provisions of the Constitution of the United States, we respectfully ask that the judgment of the Minnesota State Court be affirmed.

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